Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALLSTATE INSURANCE COMPANY,
AN ILLINOIS CORPORATION,

Petitioner,

v.

HON. MARK A. KARL, JUDGE OF THE
CIRCUIT COURT FOR MARSHALL COUNTY, WEST VIRGINIA,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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APPENDIX

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APPENDIX, TAB "A"

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

September 1993 Term

No. 21818

STATE OF WEST VIRGINIA EX REL.
ALLSTATE INSURANCE COMPANY,
A CORPORATION,
Relator

v.

HONORABLE MARK A. KARL, JUDGE OF THE
CIRCUIT COURT OF MARSHALL COUNTY;
JAMIE LYNN BROOKS; JAMES E. BROOKS;
AND NAOMI CARR,
Respondents

Petition for Writ of Prohibition

WRIT DENIED

Submitted: September 14, 1993
Filed: October 29, 1993

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JUSTICE MILLER delivered the opinion of the Court.

SYLLABUS BY THE COURT

1. The prohibition standard set out in Syllabus Point 1 of Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979), permits an original prohibition proceeding in this Court to correct substantial legal errors where the facts are undisputed and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources.

2. "W. Va. Code, 33-6-31(b), as amended, on uninsured and underinsured motorist coverage, contemplates recovery, up to coverage limits, from one's own insurer, of full compensation for damages not compensated by a negligent tortfeasor who at the time of the accident was an owner or operator of an uninsured or underinsured motor vehicle. Accordingly, the amount of such tortfeasor's motor vehicle liability insurance coverage actually available to the injured person in question is to be deducted from the total amount of damages sustained by the injured person, and the insurer providing underinsured motorist coverage is liable for the remainder of the damages, but not to exceed the coverage limits." Syllabus Point 4, State Automobile Mutual Insurance Co. v. Youler, 183 W. Va. 556, 396 S.E.2d 737 (1990).

3. "W. Va. Code, 33-6-31(d) (1988), outlines certain rights given to an uninsured/underinsured insurance carrier where a tortfeasor who is uninsured or underinsured is sued by a plaintiff. It requires that a copy of the complaint be served upon

the insurance carrier. It also allows the carrier 'the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured vehicle or in its own name.'" Syllabus Point 1, Postlethwait v. Boston Old Colony Insurance Co., _____ W. Va. _____, 432 S.E.2d 802 (1993).

4. An underinsured motorist carrier occupies the position of an excess or additional insurer in regard to the tortfeasor's liability carrier, which is deemed to have the primary coverage. Consequently, the tortfeasor's liability carrier, having primary coverage, should ordinarily control the litigation on behalf of the tortfeasor insured.

5. A primary insurance carrier has a duty to act in good faith with respect to an excess or additional insurance carrier when defending a claim on behalf of the primary insurance carrier's insured.

6. If an underinsured motorist carrier can demonstrate that the liability insurance carrier of the tortfeasor is defending the claim in a bad faith manner, the underinsured motorist carrier may petition the court to allow it to assume primary control of the defense.

7. "A consent-to-settle provision of an automobile insurance policy pertaining to underinsured motorist coverage whereby an insured voids his underinsurance coverage by settling a claim with a tortfeasor without first obtaining the insurer's written consent when such claim involves either the insured's underinsurance coverage or potentially involves that coverage is a valid and enforceable means by which an insurer may protect its statutorily-mandated right to subrogate claims pursuant to West Virginia Code § 33-6-31(f) (1992)." Syllabus Point 3, Arndt v. Burdette, _____ W. Va. _____, 434 S.E.2d 394 (1993).

8. An underinsured motorist carrier may assume control of the litigation on behalf of the tortfeasor where the tortfeasor's liability carrier has declined to defend. An underinsured motorist carrier is not foreclosed from filing an answer on behalf of the tortfeasor when it appears that a default judgment might be entered against the tortfeasor.

9. A liability carrier and an underinsured motorist carrier may agree to jointly defend an action by having their respective attorneys participate together in the defense. This does not mean that they may file separate pleadings, indulge in separate discovery, or examine witnesses separately.

10. "'"Subrogation, being a creation of equity, will not be allowed except where the subrogee has a clear case of right and

no injustice will be done to another." Syllabus, Buskirk v. State-Planters' Bank & Trust Co., 113 W. Va. 764, 169 S.E. 738 (1933).' Syllabus point 6, Fuller v. Stonewall Cas. Co. of W. Va., 172 W. Va. 193, 304 S.E.2d 347 (1983)." Syllabus Point 2, Kittle v. Icard, 185 W. Va. 126, 405 S.E.2d 456 (1991).

11. The right of subrogation in W. Va. Code, 33-6-31(f) (1988), is not available where the policyholder has not been fully compensated for the injuries received and still has the right to recover from other sources. Subrogation is permitted only to the extent necessary to avoid a double recovery by such policyholder.

12. An underinsured motorist carrier does not have a due process right to assume independent control of the defense of a tortfeasor who is represented by a liability carrier.

13. W. Va. Code, 33-6-31(d) (1988), does not give an underinsured motorist carrier the absolute right to file pleadings on behalf of a tortfeasor who has liability coverage and is being defended by a liability insurance carrier.

14. The language of W. Va. Code, 33-6-31(d) (1988), that allows an uninsured or underinsured motorist carrier to answer a complaint in its own name is primarily designed to enable the carrier to raise policy defenses it may have against the plaintiff under its uninsured or underinsured policy.

Miller, Justice:

We granted this original proceeding in prohibition in order to resolve certain procedural issues with regard to uninsured and underinsured motorist coverage. The basic facts are not in dispute, and the case involves critical legal questions that will substantially impact the underlying civil litigation. Thus, the issues fall within the prohibition standard set out in Syllabus Point 1 of Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979),[1] which permits an original prohibition proceeding in this Court to correct substantial legal errors where the facts are undisputed and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources.

[1]Syllabus Point 1 of Hinkle states:

"In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance."

I.

The relator, Allstate Insurance Company (Allstate), issued an automobile insurance policy with uninsured and underinsured motorist coverage to David A. Carr. The policy also covered Naomi J. Carr, who was his mother, as a member of his household. Ms. Carr was injured while walking across a public street in Moundsville.[2] She was struck by an automobile operated by Jamie Lynn Brooks and owned by James E. Brooks, her father. The Brooks policy provided for liability coverage in the amount of $250,000 with State Automobile Mutual Insurance Company (State Auto).

The claim could not be settled, and Ms. Carr filed suit against the Brookses in the Circuit Court of Marshall County in February of 1993. A copy of the suit papers was also sent to Allstate pursuant to the provisions of W. Va. Code, 33-6-31(d) (1988). This section requires an insured who sues for damages arising from a motor vehicle accident and who desires to recover under the uninsured or underinsured provisions of their insurance policy to "cause a copy of the summons and a copy of the complaint to be served upon the insurance company . . . in the manner prescribed by law[.]"[3]

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[2]The parties do not dispute that Ms. Carr, as a pedestrian, was covered as an additional insured as a member of the household under her son's automobile liability policy, which contained underinsured motorist coverage.

[3]The complete text of W. Va. Code, 33-6-31(d), states:

(continued. . .)

After receipt of the complaint, Allstate filed an answer which raised several defenses on behalf of the Brookses. It also issued interrogatories against Ms. Carr and requests for production of documents. An answer was also filed by State Auto, the liability carrier for the Brookses. State Auto also filed interrogatories and requests for production of documents. A number of the requests by State Auto overlapped with Allstate's requests.[4]

Ms. Carr's attorneys then moved to restrict the participation by both Allstate and State Auto on behalf of

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[3](. . . continued)

"Any insured intending to rely on the coverage required by subsection (b) of this section [providing for uninsured and underinsured motorist coverage] shall, if any action be instituted against the owner or operator of an uninsured or underinsured motor vehicle, cause a copy of the summons and a copy of the complaint to be served upon the insurance company issuing the policy, in the manner prescribed by law, as though such insurance company were a named party defendant; such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name.

"Nothing in this subsection shall prevent such owner or operator from employing counsel of his own choice and taking any action in his own interest in connection with such proceeding."

This provision applies only where the uninsured files suit against the tortfeasor.

[4]State Auto's discovery requests covered approximately 260 items

the Brookses. The trial court, after hearing arguments and receiving briefs, by its June 11, 1993 order determined that a unified defense was warranted and required Allstate and State Auto to file a single answer on behalf of the Brookses. It required Allstate, the underinsured motorist carrier, to elect whether it would intervene in the case in its own right or merely in the name of the Brookses.

The trial court also ruled that the plaintiff need not answer Allstate's discovery requests and that State Auto's discovery would control. It also granted Ms. Carr's motion to strike certain defenses asserted by Allstate in its answer on behalf of the Brookses, finding those defenses to be without merit.[5] Following the entry of this order, Allstate filed a petition for a writ of prohibition with this Court claiming statutory and due process violations.

II.

Before we address the relator's claims, it is useful to outline some of the salient features of our uninsured and underinsured insurance law. Its statutory provisions are contained in W. Va. Code, 33-6-31. We recognized in State

[5]The defenses asserted by Allstate included a lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, and insufficiency of service of process. We decline to address the validity of this ruling in light of our holding that the trial court was correct in ruling that a single answer on behalf of the Brookses was proper.

Automobile Mutual Insurance Co. v. Youler, 183 W. Va. 556, 396 S.E.2d 737 (1990), that the purpose of our statutory requirement that insurers offer uninsured and underinsured protection in motor vehicle liability policies is to protect an injured insured when the defendant tortfeasor has either no liability insurance coverage (uninsured) or has inadequate liability coverage (underinsured). We summarized the statutory provisions contained in W. Va. Code, 33-6-31(b), in Syllabus Point 4 of Youler:

> "W. Va. Code, 33-6-31(b), as amended, on uninsured and underinsured motorist coverage, contemplates recovery, up to coverage limits, from one's own insurer, of full compensation for damages not compensated by a negligent tortfeasor who at the time of the accident was an owner or operator of an uninsured or underinsured motor vehicle. Accordingly, the amount of such tortfeasor's motor vehicle liability insurance coverage actually available to the injured person in question is to be deducted from the total amount of damages sustained by the injured person, and the insurer providing underinsured motorist coverage is liable for the remainder of the damages, but not to exceed the coverage limits."

See also Pristavec v. Westfield Ins. Co., 184 W. Va. 331, 400 S.E.2d 575 (1990).

Recently, in Syllabus Point 1 of Postlethwait v. Boston Old Colony Insurance Co., _____ W. Va. _____, 432 S.E.2d 802 (1993), we outlined the procedural mechanism under W. Va. Code, 33-6-31(d), that a plaintiff must follow to give an uninsured or underinsured carrier notice of the litigation:

> "W. Va. Code, 33-6-31(d) (1988), outlines certain rights given to an uninsured/underinsured insurance carrier where a tortfeasor who is uninsured or underinsured is sued by a plaintiff. It requires that a copy of the complaint be served upon the insurance carrier. It also allows the carrier 'the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured vehicle or in its own name.'"

III.

What is at issue here is the proper relationship between the tortfeasor's liability carrier and the plaintiff's own insurance carrier, who provides the underinsured motorist coverage, when litigation arises. We are not cited nor have we found a published opinion that deals with the issues raised in this case.[6]

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[6]Allstate submits an unpublished opinion by the Intermediate Court of Appeals of Tennessee, Fyke v. Clark, 1989 WL 146736 (Tenn. App.). It would appear in Tennessee that an unpublished opinion "has no precedential value except to the parties in the case[.]" Patton v. McHone, 822 S.W.2d 608, 615 n.10 (Tenn. App. 1991). If it did have precedential value in Tennessee, we would have to determine under principles of comity whether we could give it precedential value. Even if we were to consider this opinion, it is clear that the issue raised therein was only whether the trial court erred in precluding the liability insurance carrier and the underinsured carrier from conducting a joint defense when they represented

> "that there would be no promotion of any interest, separate or additional from the named defendant's interest, nor attempt at any separate or additional cross-examination of witnesses, but also it was made clear that the named defendant expressly consented and agreed that counsel for the underinsured motorist carrier work together with her attorney in presenting the defense on her behalf and in her name before the jury." 1989 WL 146736 at 2.

(continued. . .)

The parties acknowledge that each carrier has an interest in the case through its respective exposure to an adverse award of damages.[7] Under our statutory scheme, the role of an underinsured carrier is analogous to that of a secondary or excess carrier.[8]

We dealt with a related issue in Allstate Insurance Co. v. State Automobile Mutual Insurance Co., 178 W. Va. 704, 364 S.E.2d 30 (1987), where State Auto insured a vehicle that the owner allowed a friend to operate. In the course of operating the

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[6](. . . continued)
For the reasons set out in Part III, infra, we have approved such an arrangement. See Syllabus Point 9, supra.

[7]Where the tortfeasor has no liability coverage, the plaintiff's uninsured motorist carrier would be the only insurance carrier exposed to the plaintiff's liability claim. In most instances, the uninsured carrier would then control the defense. We recognize that W. Va. Code, 33-6-31(d), contains this proviso: "Nothing in this subsection shall prevent such owner or operator from employing counsel of his own choice and taking any action in his own interest in connection with such proceeding." See generally 2 Widiss, Uninsured and Underinsured Motorist Coverage § 28.14 (1992). Certainly, if the uninsured carrier is acting in bad faith in its defense of the tortfeasor, the tortfeasor's attorney may seek to control the defense.

[8]The role of an excess carrier is summarized in Section 4682 of 7C J. Appelman, Insurance Law and Practice (1979 & Supp. 1992):

> "Excess insurance is routinely written in the insurance industry with the expectation that the primary insurer will conduct all of the investigation, negotiation and defense of claims until its limits are exhausted . . . . Thus, the primary insurer acts as a sort of deductible and the excess insurer does not expect to be called upon to assist in these details."

vehicle, the friend injured the plaintiff. The friend also had insurance through Allstate that provided coverage if its insured operated another vehicle. We found that both coverages applied, but concluded that the "bright-line rule of law [is] that the primary obligation to defend and indemnify follows the automobile, rather than the driver[.]" 178 W. Va. at 707, 364 S.E.2d at 33.[9]

In the underinsured motorist context, our cases suggest that the primary duty to defend rests with the tortfeasor's liability carrier. Although we have not had occasion to express this precise point in a Syllabus, it is implicit in Youler, supra, and the cases that followed it that this principle was at the heart of the discussion. See generally Annot., 24 A.L.R.4th 13 (1983). The primary duty of the tortfeasor's liability carrier to defend is impliedly recognized in the last sentence of subsection (b) of W. Va. Code, 33-6-31, that states: "No sums payable as a result of underinsured motorists' coverage shall be reduced by payments made under the insured's policy or any other policy." This sentence was added in 1988 and precludes an underinsured carrier from setting off payments made by the liability carrier against the amounts due under the underinsurance coverage.

[9]The Court's discussion in Allstate, supra, centered on the fact that both policies contained pro-rata and excess coverage language that could not be reconciled. We stated in Syllabus Point 1: "We adopt the rule that when a pro-rata clause and an excess clause appear in the automobile liability policies of both the driver and the owner of an automobile, the insurer of the owner is primarily liable and must bear the whole loss, within the limits of the policy."

We conclude that the legislature, by precluding a set-off by the underinsured carrier intended that the liability carrier's payment serve as the initial layer of damage recovery. It follows that the underinsured carrier's limits are then additional coverage. We believe that the language in W. Va. Code, 33-6-31(b), forbidding a set-off, indicates a legislative intent to make the liability carrier the primary coverage carrier, and the underinsured carrier the excess or additional coverage carrier.

The Louisiana Supreme Court in Bond v. Commercial Union Assurance Co., 407 So. 2d 401, 410 (1981), explicitly recognized the relationship between the underinsured carrier and the liability carrier for the tortfeasor as an additional or excess insured when it stated:

> "Accordingly, the object of the uninsured motorist statute, as amended, is to promote full recovery for damages by innocent automobile accident victims by making uninsured motorist coverage available for their benefit as primary protection when the tortfeasor is without insurance and as additional or excess coverage when he is inadequately insured." (Citations omitted).

We, therefore, conclude that an underinsured motorist carrier occupies the position of an excess or additional insurer in regard to the tortfeasor's liability carrier, which is deemed to have the primary coverage. Consequently, the tortfeasor's liability carrier, having primary coverage, should ordinarily control the litigation on behalf of the tortfeasor insured.

This does not mean that an excess carrier, such as an underinsured carrier, is without protection against either collusion between the plaintiff and the liability carrier or negligent handling of the defense. It is generally acknowledged that a primary insurance carrier has a duty to act in good faith with respect to an excess or additional insurance carrier when defending a claim on behalf of the primary insurance carrier's insured. See, e.g., Valentine v. Aetna Ins. Co., 564 F.2d 292 (9th Cir. 1977); American Fidelity & Cas. Co. v. All Am. Bus Lines, Inc., 190 F.2d 234 (10th Cir.), cert. denied, 342 U.S. 851, 72 S. Ct. 79, 96 L. Ed. 642 (1951); Allstate Ins. Co. v. Reserve Ins. Co., 116 N.H. 806, 373 A.2d 339 (1976) ; Home Ins. Co. v. Royal Indem. Co., 68 Misc. 2d 737, 327 N.Y.S.2d 745, aff'd, 39 A.D.2d 768, 332 N.Y.S.2d 1003 (1972); Centennial Ins. Co. v. Liberty Mut. Ins. Co., 62 Ohio St. 2d 221, 404 N.E.2d 759 (1980). We therefore apply the foregoing principle to underinsured motorist carriers to the extent that if an underinsured motorist carrier can demonstrate that the liability insurance carrier of the tortfeasor is defending the claim in a bad faith manner, the underinsured motorist carrier may petition the court to allow it to assume primary control of the defense.

We recently recognized another protection afforded to an underinsured carrier in Arndt v. Burdette, _____ W. Va. _____, 434 S.E.2d 394 (1993). There, we stated in Syllabus Point 3 that if the underinsured carrier's policy has a "consent-to-settle"

provision, the underinsured carrier must consent to the plaintiff's settlement with the tortfeasor's liability carrier:

> "A consent-to-settle provision of an automobile insurance policy pertaining to underinsured motorist coverage whereby an insured voids his underinsurance coverage by settling a claim with a tortfeasor without first obtaining the insurer's written consent when such claim involves either the insured's underinsurance coverage or potentially involves that coverage is a valid and enforceable means by which an insurer may protect its statutorily-mandated right to subrogate claims pursuant to West Virginia Code § 33-6-31(f) (1992)."[10]

The consent-to-settle language in an underinsured policy is common, and, as we indicated in the foregoing Syllabus, it protects the insurer's statutory subrogation right. However, it is also designed to foreclose a collusive settlement between the plaintiff and the tortfeasor's liability carrier. See generally 2 Widiss, Uninsured and Underinsured Motorist Coverage § 17.2 (1992).

In addition to the foregoing protections afforded an underinsured carrier, it is clear that such a carrier may assume control of the litigation on behalf of the tortfeasor where the tortfeasor's liability carrier has declined to defend. Moreover, an underinsured motorist carrier is not foreclosed from filing an

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[10]However, as we recognized in note 10 of Arndt v. Burdette, _____ W. Va. at _____, 434 S.E.2d at 400: "It is important to note that if an insurer acts unreasonably in refusing to give written consent to settle, that insurer may be subjecting itself to a bad faith claim pursuant to this Court's holding in Shamblin v. Nationwide Mutual Insurance Co., 183 W. Va. 585, 396 S.E.2d 766 (1990)."

answer on behalf of the tortfeasor when it appears that a default judgment might be entered against the tortfeasor.[11]

Finally, we find that a liability carrier and an underinsured motorist carrier may agree to jointly defend an action by having their respective attorneys participate together in the defense. This does not mean that they may file separate pleadings, indulge in separate discovery, or examine witnesses separately.

In a related matter, we also recognize that W. Va. Code, 33-6-31(f), gives a right of subrogation as follows:

> "An insurer paying a claim under the endorsement or provisions required by subsection (b) of this section shall be subrogated to the right of the insured to whom such claim was paid against the person causing such injury, death or damage to the extent that payment was made."

While this right of subrogation can be waived by the uninsured or underinsured carrier, we do not believe such carrier can be forced to waive its subrogation rights by the threat of a tortfeasor's liability carrier to withhold settlement of the claim. The primary liability carrier of the tortfeasor has a duty to deal in good faith both with its insured and with the underinsured carrier, and may subject itself to a bad faith suit by making such a demand and

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[11]Prudence would dictate that the underinsured carrier first contact plaintiff's counsel to determine if an extension of time to answer had been granted.

refusing to settle if such demand is not met. See Shamblin v. Nationwide Mut. Ins. Co., 183 W. Va. 585, 396 S.E.2d 766 (1990).

We have recognized that subrogation is an equitable doctrine, stating in Syllabus Point 2 of Kittle v. Icard, 185 W. Va. 126, 405 S.E.2d 456 (1991):

> "'"Subrogation, being a creation of equity, will not be allowed except where the subrogee has a clear case of right and no injustice will be done to another." Syllabus, Buskirk v. State-Planters' Bank & Trust Co., 113 W. Va. 764, 169 S.E. 738 (1933).' Syllabus point 6, Fuller v. Stonewall Cas. Co. of W. Va., 172 W. Va. 193, 304 S.E.2d 347 (1983)."

Other jurisdictions have specifically dealt with the right of subrogation in an uninsured or underinsured motorist context. In these cases, the right of subrogation existed either by virtue of language in the insurance policy or by virtue of a statute similar to W. Va. Code, 33-6-31(f). The general rule is summarized in 2 A. Widiss, Uninsured and Underinsured Motorist Insurance § 19.6 at 124:

> "Courts in a substantial number of states have concluded that the terms of a subrogation or trust provision are not enforceable when the insured has not been fully indemnified; consequently, an attempt by an insurance company to secure proceeds of a recovery from a third party -- such as the uninsured motorist or a party who is jointly liable--is appropriately denied when the damages sustained by an insured have not been completely compensated."

See, e.g., White v. Nationwide Mut. Ins. Co., 361 F.2d 785 (4th Cir. 1966) (Virginia law - statute); Alabama Farm Bureau Mut. Cas. Ins. Co. v. Humphrey, 54 Ala. App. 343, 308 So. 2d 255 (1975) (policy); Government Employees Ins. Co. v. Oliver, 192 Cal. App. 3d 12, 237 Cal. Rptr. 174 (1987) (statute); Central Nat'l Ins. Group v. Hotte, 312 So. 2d 235 (Fla. App. 1975) (policy); Thatcher v. Eichelberger, 102 Ill. App. 3d 231, 57 Ill. Dec. 816, 429 N.E.2d 1090 (1981) (statute); Bond v. Commercial Union Assur. Co., supra (statute); Michigan Mut. Ins. Co. v. Shaheen, 101 Mich. App. 761, 300 N.W.2d 599 (1980) (policy); Milbank Mut. Ins. Co. v. Kluver, 302 Minn. 310, 225 N.W.2d 230 (1974) (statute); Dunham v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 668 (Miss. 1979) (statute); McGhee v. Charley's Other Brother, 161 N.J. Super. 551, 391 A.2d 1289 (Law Div. 1978), aff'd sub nom. Mozee v. McGhee, 171 N.J. Super. 454, 410 A.2d 46 (1979) (policy); Walls v. City of Pittsburgh, 292 Pa. Super. 18, 436 A.2d 698 (1981) (statute); Lombardi v. Merchants Mut. Ins. Co., 429 A.2d 1290 (R.I. 1981) (policy).

The Supreme Court of Minnesota in Milbank Mutual Insurance Co. v. Kluver, 302 Minn. at 315-16, 225 N.W.2d at 233, after examining its uninsured motorist statute, came to this conclusion:

> "We are persuaded by the rationale of these cases and by our own analysis of the statute in question that the uninsured motorist coverage statute should be construed to mean that an uninsured-motorist liability carrier does not have the right to be subrogated to

> the proceeds of a settlement its policyholder makes with liquor vendors allegedly liable . . . where the policyholder has not been fully compensated for her injuries. Subrogation should be permitted to the extent necessary to avoid a double recovery by such a policyholder." (Emphasis added).

We agree with this analysis and conclude that the right of subrogation in W. Va. Code, 33-6-31(f), is not available where the policyholder has not been fully compensated for the injuries received and still has the right to recover from other sources. Subrogation is permitted only to the extent necessary to avoid a double recovery by such policyholder.

IV.

Allstate's next claim is that if it is denied the right to participate in this litigation, its constitutional due process rights will be infringed. We are not cited nor have we found any case where an underinsured or excess carrier has raised a due process argument based on the premise of its inability to proceed to fully represent the defendant tortfeasor.

In this type of litigation, the named defendant is the tortfeasor. It is this party who has due process rights. The underinsured carrier, if properly brought into a case, has a duty under its contract and the language of W. Va. Code, 33-6-31(d), to afford coverage to the plaintiff and to pay up to the policy limits on any judgment obtained against the defendant not covered by the tortfeasor's liability carrier. The fact that the actual defense

of the tortfeasor is conducted by his or her liability carrier does not mean that the underinsured carrier's rights are sacrificed. The protections that we have afforded the underinsured carrier in Part III of this opinion will further protect that carrier's rights. Thus, we conclude that an underinsured motorist carrier does not have a due process right to assume independent control of the defense of a tortfeasor who is represented by a liability carrier.

The few cases which can be found relating to an underinsured motorist carrier's right to intervene do not allow intervention as a matter of right nor do they express any due process considerations. In Husfeldt v. Willmsen, 434 N.W.2d 480 (Minn. App. 1989), the court affirmed the trial court's decision denying intervention to the underinsured carrier. The argument was advanced that the underinsured carrier would be liable for any verdict in excess of the coverage afforded by the tortfeasor's liability carrier. The court rejected this argument, stating: "[I]t has not made a showing that its rights are not being adequately represented by the existing parties. It made a conclusory statement that its rights will be jeopardized, but gave no specific facts or reasons why." 434 N.W.2d at 482-83.

The Kansas Supreme Court in Haas v. Freeman, 236 Kan. 677, 693 P.2d 1199 (1985), determined that an underinsured motorist carrier had the option to intervene, but did not discuss what role

the carrier would play with regard to handling the litigation with the tortfeasor's liability carrier. See also Ramsey v. Chism, 249 Kan. 299, 817 P.2d 198 (1991). The Haas court relied on Tidmore v. Fullman, 646 P.2d 1278 (Okla. 1982), which accorded the underinsured carrier the right to intervene, but did not discuss the underinsured carrier's role in the case vis-a-vis the tortfeasor's liability carrier. We do not find these cases to be helpful since they do not analyze the issue before us, i.e., the role to be played by the underinsured carrier once litigation is commenced.

Nor do we find that the procedural language in W. Va. Code, 33-6-31(d),[12] allowing an uninsured/underinsured carrier to file pleadings in its own name or on behalf of the tortfeasor, see Postlethwait v. Boston Old Colony Ins. Co., supra, enables the carrier to control the defense on behalf of the tortfeasor or to conduct a separate defense. It must be remembered that under W. Va. Code, 33-6-31(d), a plaintiff files suit against a tortfeasor. If the plaintiff desires to bring his or her uninsured or underinsured coverage into play, a copy of the complaint must be

[12]The applicable portion of W. Va Code 33-6-31(d), is: "[S]uch company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name."

served on that carrier.[13] However, the uninsured or underinsured carrier is not a named party in the complaint.

It must be remembered also that W. Va. Code, 33-6-31, now addresses both uninsured and underinsured motorist coverages. Originally, W. Va. Code, 33-6-31(b) and -31(d), addressed only uninsured motorist coverage. It was not until 1982 that underinsured motorist coverage was added to the purview of W. Va. Code, 33-6-31(b).[14] Even though the right to obtain underinsured motorist coverage was added to subsection (b), the procedure outlined in W. Va. Code, 33-6-31(d), still only included uninsured motorists and did not refer to underinsured motorists. This oversight was not corrected until 1988 when the term "underinsured" was placed in W. Va. Code, 33-6-31(d).[15]

It is apparent from the foregoing legislative history that the original purpose of W. Va. Code, 33-6-31(d), was to protect the uninsured motorist carrier where the tortfeasor had no liability coverage. In this situation, the uninsured motorist carrier would be the only insurance carrier liable. In the absence of more specific language, W. Va. Code, 33-6-31(d), does not give an underinsured motorist carrier the absolute right to file

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[13]For the complete text of W. Va. Code, 33-6-31(d), see note 3, supra.

[14]See 1982 W. Va. Acts ch. 106.

[15]See 1988 W. Va. Acts ch. 75.

pleadings on behalf of a tortfeasor who has liability coverage and is being defended by the liability insurance carrier.

Moreover, the language of W. Va. Code, 33-6-31(d), that allows an uninsured or underinsured carrier to answer a complaint in its own name is primarily designed to enable the carrier to raise policy defenses it may have against the plaintiff under its uninsured or underinsured policy. We recognized a similar right on behalf of a plaintiff who sues a tortfeasor and discovers that the tortfeasor's carrier has denied coverage in Christian v. Sizemore, 181 W. Va. 628, 383 S.E.2d 810 (1989). There, we held that a declaratory judgment cause of action could be placed in the complaint for personal injuries and that such an issue should be resolved prior to submitting the liability issue to the jury.[16] However, we do not find that this right of the underinsured carrier to file an answer in its own name was intended to give the underinsured carrier the right to separately defend along with the tortfeasor's own carrier.[17]

---

[16]Syllabus Point 3 of Christian v. Sizemore, supra, states: "An injured plaintiff may bring a declaratory judgment action against the defendant's insurance carrier to determine if there is policy coverage for obtaining a judgment against the defendant in the personal injury action where the defendant's insurer has denied coverage."

[17]It is difficult to conceive of any other reason why an uninsured or underinsured carrier would answer for the tortfeasor by filing the answer in the insurance carrier's own name. If the carrier answered in its own name, it could well waive its right not to have insurance mentioned in the tortfeasor's liability case. See Davis v. Robertson, 175 W. Va. 364, 332 S.E.2d 819 (1985); Coffindaffer v. Coffindaffer, 161 W. Va. 557, 244 S.E.2d

(continued...)

As an ancillary claim, Allstate asserts that the trial court erred when it required Allstate to elect whether to file an answer in its own name or to allow the tortfeasor's liability carrier to defend. However, we do not agree. The apparent purpose of that requirement was to determine whether Allstate intended to assert some policy defense in order to avoid coverage under its underinsured policy.

Having determined that the Circuit Court of Marshall County was correct in its ruling, we decline to issue the writ of prohibition.

Writ denied.

---

[17](. . . continued)
338 (1978).

APPENDIX, TAB "B"

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

NORMA J. CARR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 93-C-72 K
	)	
JAMIE LYNN BROOKS and JAMES E. BROOKS	)	
	)	
Defendants.	)	

MOTION FOR SINGLE ANSWER

Now comes your plaintiff, Norma J. Carr, who hereby moves for an order requiring the parties responding by and/or on behalf of the defendants, Jamie Lynn Brooks and James E. Brooks, not be permitted to file an additional answer. As grounds for this motion, your plaintiff states and alleges as follows:

(1) This action involves personal injuries received by Norma J. Carr when she was struck by an automobile driven by Jamie Lynn Brooks on October 17, 1991. Allstate Insurance Company was served with a copy of the Complaint pursuant to the underinsurance statute in West Virginia, namely, W. Va. Code § 33-6-31.

(2) On March 10, 1993, Walter M. Jones III, counsel for Allstate Insurance Company, filed an Answer to the Complaint.

(3) On March 19, 1993, Jamie Lynn Brooks and James E. Brooks appeared by their counsel, Don M. Kresen, of the law firm of Jackson & Kelly, and a stipulated order was entered permitting Jamie Lynn Brooks and James E. Brooks an additional thirty (30) days to answer or otherwise respond to the Complaint.

(4) On the basis that a Complaint has now been filed on behalf of the interests of the defendants, Jamie Lynn Brooks and James E. Brooks, it would be improper for an additional answer to be filed on their behalf alleging different responses, answers and/or defenses.

Wherefore, your plaintiff prays that an order be entered prohibiting any further answers to be filed on behalf of the defendants, Jamie Lynn Brooks and James E. Brooks, other than that which has been previously filed.

NOTICE OF HEARING

You will please take notice that a hearing will be held on the foregoing **MOTION FOR SINGLE ANSWER** before the Honorable Mark A. Karl, Judge of the Circuit Court of Marshall County, West Virginia, in his chambers located in the Marshall County Courthouse, Moundsville, West Virginia, on **Friday,** the **7th** day

of **May, 1993,**at **11:30** o'clock **a.m.,** or as soon thereafter as the matter may be heard.

NORMA J. CARR

by: /s/ Robert P. Fitzsimmons

Robert P. Fitzsimmons
Fitzsimmons & Parson, L.C.
2003 Warwood Avenue
Wheeling, West Virginia 26003
(304) 277-1400

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Moundsville, West Virginia 26041
(304) 845-2300

APPENDIX, TAB "C"

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

NORMA J. CARR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 93-C-72 K
	)	
JAMIE LYNN BROOKS and JAMES E. BROOKS,	)	
	)	
Defendants.	)	

MOTION TO STRIKE AFFIRMATIVE DEFENSES FIRST THROUGH SEVENTH AND FOURTEENTH AND MOTION FOR SANCTIONS

Now comes your plaintiff, Norma J. Carr, who hereby moves for an order striking the affirmative defenses listed as First through Seventh and Fourteenth on the basis that said defenses are clearly without merit and constitute frivolous pleadings and a violation of Rule 11 of the West Virginia Rules of Civil Procedure.

Plaintiff will address each of the frivolous affirmative defenses raised by counsel for Allstate Insurance Company separately.

First Affirmative Defense

Counsel for Allstate Insurance Company alleges in the First Defense that:

> "Plaintiff's Complaint fails to state a cause of action against the defendants, Jamie Lynn Brooks and James E. Brooks, upon which relief can be granted."

The Complaint in this action alleges that the cause of action is one of negligence. (See Paragraph 4 of plaintiff's Complaint.) Rule 9(b) of the West Virginia Rules of Civil Procedure states that:

> "NEGLIGENCE MAY ALSO BE AVERRED GENERALLY."
> [Emphasis added.]

The law in West Virginia is clear that cases in West Virginia should be decided upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion to dismiss or a defense for failure to state a claim upon which relief can be granted is unjustified and must be denied. John W. Lodge Distributing Company v. Texaco, Inc., 245 S.E.2d 157 (W. Va., 1978). It has further been held that any language in a complaint which will apprise the opposing party of the cause of action is sufficient. Warner v. Kittle, 280 S.E. 2d 276 (W. Va., 1981).

Paragraph 3 of the Complaint joins Defendant James E. Brooks under the theory of family-purpose doctrine which is clearly a recognizable cause of action in West Virginia. (See Paragraph 3 of Plaintiff's Complaint.)

Counsel for Allstate Insurance Company has failed to set

forth any grounds for the First Affirmative Defense which based upon the Complaint itself is clearly without any merit, and this is particularly so in actions of negligence which can be averred generally.

Second Affirmative Defense

Counsel for Allstate Insurance Company alleges:

> "Plaintiff's Complaint fails to state a cause of action against Allstate Insurance Company upon which relief can be granted."

Allstate Insurance Company is not a named defendant or party in this lawsuit and was served pursuant to W. Va. Code §33-6-31. The affirmative defense raised by counsel for Allstate Insurance Company does not in any way address any of the averments set forth in the Complaint and is frivolous.

Third Affirmative Defense

Counsel for Allstate Insurance Company alleges in his Third Defense that:

> ". . . the affirmative defense of lack of jurisdiction over the subject matter."

Article 8, Section 6, of the Constitution of West Virginia provides in pertinent part that:

> "Circuit court shall have original and general jurisdiction of all civil cases at law where the value or amount in controversy, exclusive of interest and costs, exceeds one hundred dollars unless such value or amount is increased by the legislature; . . ."

Chapter 51, Article 2, Section 2, of the West Virginia Code provides that in circuit courts jurisdiction is over all matters at law where the amount in controversy, exclusive of interest, exceeds three hundred dollars.

The Complaint alleges negligence which is a matter at law, and the ad damnum clause states, "the minimum jurisdictional amount for filing this action is met."

Clearly, this affirmative defense is totally without merit.

Fourth Affirmative Defense

Counsel for Allstate Insurance Company alleges in his Fourth Defense:

> ". . . the affirmative defense of lack of jurisdiction over the person of the Defendants, Jamie Lynn Brooks and James E. Brooks."

Paragraph 1 of the Complaint alleges that the defendants, Jamie Lynn Brooks and James E. Brooks, are residents of Marshall County, West Virginia. Service upon the defendants was also had in Marshall County, West Virginia, by serving them with a copy

of the Summons and Complaint at their residence and by depositing a copy of the Summons and Complaint with a member of their household on February 23, 1993, as is evidenced by Exhibit 1 attached hereto.

This affirmative defense is totally without merit.

Fifth Affirmative Defense

Counsel for Allstate Insurance Company alleges in the Fifth Defense:

> ". . . the affirmative defense of improper venue."

Paragraph 1 of the Complaint alleges that the defendants are residents of Marshall County. Paragraph 2 of the Complaint alleges that the plaintiff is a resident of Marshall County. Paragraph 4 of the Complaint alleges that the cause of action occurred in Marshall County.

Chapter 56, Article 1, Section 1, of the West Virginia Code states in pertinent part as follows:

> "(a) Any civil action or other proceeding, except where it is otherwise specifically provided, may hereafter be brought in the circuit court of any county:
>
> "(1) **WHEREIN ANY OF THE DEFENDANTS MAY RESIDE OR THE CAUSE OF ACTION AROSE**, . . ."

Allstate Insurance Company's Fifth Affirmative Defense is

totally without merit.

Sixth Affirmative Defense

Counsel for Allstate Insurance Company asserts in his Sixth Defense and Seventh Defense "insufficiency of process" and "insufficiency of service of process."

Rule 4(d)(1) provides that process may be had:

> ". . . by delivering a copy of the summons and of the complaint at his dwelling house or usual place of abode to a member of his family above the age of sixteen years . . ."

Exhibit 1 attached hereto evidences that the Summons and Complaint in this matter were served upon both defendants by serving Jamie Lynn Brooks' mother and James E. Brooks' wife through the Marshall County Sheriff's Department.

These two affirmative defenses are without ny merit whatsoever.

Fourteenth Affirmative Defense

Counsel for Allstate Insurance Company asserts in his Fourteenth Defense:

> ". . . all policy defenses applicable to the underinsured motorist claim . . ."

The Complaint is a complaint sounding in tort, and no

averments have been made concerning underinsurance coverage or any other type of contractual insurance coverage. This defense has absolutely no relevance to the pending action and is without merit.

SUMMARY

Rule 11 provides that every pleading must be signed by at least one attorney of record. The rule further states in pertinent part that:

> "The signature of an attorney or party CONSTITUTES A CERTIFICATE by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief FORMED AFTER REASONABLE INQUIRY IT IS WELL GROUNDED IN FACT AND IS WARRANTED BY EXISTING LAW OR A GOOD FAITH ARGUMENT FOR THE EXTENSION, MODIFICATION, OR REVERSAL OF EXISTING LAW, AND THAT IT IS NOT INTERPOSED FOR ANY IMPROPER PURPOSE, SUCH AS TO HARASS OR TO CAUSE UNNECESSARY DELAY OR NEEDLESS INCREASE IN THE COST OF LITIGATION." [Emphasis added.]

If counsel for Allstate Insurance Company would have checked the courthouse records, he would have determined that process was proper and that service of process of proper. Allstate Insurance Company's counsel could have easily determined that jurisdiction over the subject matter and persons were proper by reviewing the Complaint, and in particular the ad damnum clause, and by checking the courthouse records to determine service had been obtained upon the defendants. Venue

could have easily been determined to have been proper by merely looking at the Complaint.

It is clear that counsel for Allstate Insurance Company has taken a cavalier attitude or is intentionally attempting to interpose delay or harass plaintiff or cause additional expenses in this litigation by filing clearly frivolous and unwarranted affirmative defenses.

Plaintiff's counsel is very interested in hearing the "reasonable inquiries" made by counsel for Allstate Insurance Company, together with his statement that such affirmative defenses were "well grounded in fact" in a hearing on this motion.

Plaintiff's counsel requests that the defenses labeled as First through Seventh and Fourteenth be stricken. Counsel further requests that the Court enter an order finding that Allstate Insurance Company's counsel has violated Rule 11 of the West Virginia Rules of Civil Procedure and enter sanctions, including reasonable attorney fees incurred in the prosecution of this motion.

NOTICE OF HEARING

You will please take notice that hearing will be held on the foregoing **MOTION TO STRIKE AFFIRMATIVE DEFENSES FIRST THROUGH SEVENTH AND FOURTEENTH AND MOTION FOR SANCTIONS** before

the Honorable Mark A. Karl, Judge of the Circuit Court of Marshall County, West Virginia, in his chambers located in the Marshall County Courthouse, Moundsville, West Virginia, on **Friday, the 7th day of May, 1993, at 11:30** o'clock **a.m.,** or as soon thereafter as the matter may be heard.

NORMA J. CARR

By: /s/ Robert P. Fitzsimmons
Of Counsel

Robert P. Fitzsimmons
Fitzsimmons & Parsons, L.C.
2003 Warwood Avenue
Wheeling, West Virginia 26003
(304) 277-1400

G. Charles Hughes
G. Charles Hughes, L.C.
Post Office Box 871
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CERTIFICATE OF SERVICE

Service of the foregoing **MOTION TO STRIKE AFFIRMATIVE DEFENSES FIRST THROUGH SEVENTH AND FOURTEENTH AND MOTION FOR SANCTIONS** and **NOTICE OF HEARING** was made upon the parties to this action by mailing a true copy thereof by United States mail, postage prepaid, to their respective attorneys on the 23 day of March, 1993, as follows:

JAMIE LYNN BROOKS and
JAMES E. BROOKS
c/o Donald M. Kresen, Esq.
Jackson & Kelly
Post Office Drawer 68
New Martinsville, West Virginia 26155

ALLSTATE INSURANCE COMPANY
c/o Walter M. Jones, III, Esq.
Martin & Seibert, L.C.
Post Office Box 1286
Martinsburg, West Virginia 25401

/s/ Robert P. Fitzsimmons
Of Counsel for Plaintiff

APPENDIX, TAB "D"

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

NORMA J. CARR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 93-C-72 K
	)	
JAMIE LYNN BROOKS and JAMES E. BROOKS	)	
	)	
Defendants.	)	

MOTION FOR ALLSTATE INSURANCE COMPANY TO MAKE ELECTION PURSUANT TO W. Va. CODE 33-6-31(d)

Now comes your plaintiff, Norma J. Carr, who hereby moves that Allstate Insurance Company be required to make an election to appear on behalf of the defendants or in its own name. As grounds for this motion, your plaintiff states and alleges as follows:

(1) This is a negligence action alleging that the defendants were negligent and caused injury to the plaintiff, Norma J. Carr, when the automobile driven by Defendant Jamie Lynn Brooks struck Norma J. Carr, who was then a pedestrian.

(2) Allstate Insurance Company was served pursuant to the underinsurance motorists statute, W. Va. Code § 33-6-31.

(3) It is unclear from reading the Answer filed by Allstate Insurance Company whether it is appearing in its own name or in the name of the defendants.

(4) If Allstate Insurance Company is appearing in its own name, then plaintiff is of the opinion that such election once made and which cannot be changed would entitle Allstate Insurance Company to conduct discovery and to be required to participate in discovery provided that once said election has been made and the rights attendant therewith have been exercised that such election cannot be changed.

Wherefore, your plaintiff prays that this Court order that Allstate Insurance Company now make its election pursuant to W. Va. Code § 33-6-31(d).

NOTICE OF HEARING

You will please take notice that a hearing will be held on the foregoing **MOTION FOR ALLSTATE INSURANCE COMPANY TO MAKE ELECTION PURSUANT TO W. Va. CODE § 33-6-31(d)** before the honorable Mark A. Karl, Judge of the Circuit Court of Marshall County, West Virginia, in his chambers located in the Marshall County Courthouse, Moundsville, West Virginia, on **Friday**, the **7th** day of **May, 1993**,at **11:30** o'clock **a.m.**, or as soon thereafter as the matter may be heard.

NORMA J. CARR

By: /s/ Robert P. Fitzsimmons
Of Counsel

Robert P. Fitzsimmons
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APPENDIX, TAB "E"

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

NORMA J. CARR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 93-C-72 K
	)	
JAMIE LYNN BROOKS	)	
and JAMES E. BROOKS	)	
	)	
Defendants.	)	

MOTION FOR PROTECTIVE ORDER

Now comes your plaintiff, Norma J. Carr, who hereby moves for a protective order pursuant to Rule 26(c) of the West Virginia Rules of Civil Procedure. As grounds for this motion, your plaintiff states and alleges as follows:

(1) This is an action for personal injuries resulting from the alleged negligence of Defendant Jamie Lynn Brooks when her automobile struck the plaintiff, Norma J. Carr, who was a pedestrian, on October 17, 1991. (See Paragraph 4 of plaintiff's Complaint.)

(2) Defendant James E. Brooks is a party to the lawsuit on the basis of the family-purpose doctrine. (See Paragraph 3 of plaintiff's Complaint.)

(3) Allstate Insurance Company was served in this case pursuant to W. Va. Code § 33-6-31 and is not a named party nor is any cause of action stated against Allstate Insurance Company.

(4) Attorney Donald M. Kresen, of the law firm of Jackson & Kelly, has entered an appearance on behalf of the defendants, Jamie Lynn Brooks and James E. Brooks, and obtained an order granting him an extension to file an answer or otherwise respond to the Complaint by April 14, 1993.

(5) Allstate Insurance Company states in its Answer (first paragraph) that it is appearing "on behalf of the interest of the defendants, Jamie Lynn Brooks and James E. Brooks." The Answer is then signed on behalf of the insurance company.

(6) Allstate Insurance Company served "First Interrogatories" and "First Request for Production of Documents" on March 10, 1993.

(7) Allstate Insurance Company's Answer to the Complaint and interrogatories make it unclear whether Allstate Insurance Company is electing to appear on behalf of the insurance company or on behalf of the named defendants.

(8) Allstate Insurance Company is attempting to conduct discovery which most assuredly will duplicate the discovery

conducted on behalf of defendants' counsel in this proceeding, and, furthermore, Allstate Insurance Company will not be able to reciprocate by providing any meaningful type of discovery, such as answering the outstanding Interrogatories and Request for Production of Documents served upon the defendants with the Complaint.

(9) W. Va. Code § 33-6-31(d) permits an insurance company who has underinsurance to be served as if it were a named party defendant and permits the company to file pleadings and take other action allowable by law in the name of the owner or operator or both or in its own name. In this case, the Answer of Allstate Insurance Company and discovery materials are not clear as to the capacity in which Allstate Insurance Company is attempting to appear.

(10) By permitting Allstate Insurance Company to conduct discovery in this case merely serves to duplicate the entire discovery process and to cause an unneeded burden upon the plaintiffs.

(11) If Allstate Insurance Company is appearing on behalf of the interests of the defendants, plaintiff requests that this Court order that their discovery be conducted by one party so as not to duplicate the discovery.

Wherefore, plaintiff prays that a protective order for good cause shown be granted ordering that counsel for the defendants unify their discovery and be permitted to conduct discovery through single counsel.

NOTICE OF HEARING

You will please take notice that a hearing will be held on the foregoing **MOTION FOR PROTECTIVE ORDER** before the Honorable Mark A. Karl, Judge of the Circuit Court of Marshall County, West Virginia, in his chambers located in the Marshall County Courthouse, Moundsville, West Virginia, on **Friday,** the **7th** day of **May, 1993,** at **11:30** o'clock **a.m.,** or as soon thereafter as the matter may be heard.

NORMA J. CARR

By:/s/ Robert P. Fitzsimmons
Of Counsel

Robert P. Fitzsimmons
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APPENDIX, TAB "F"

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

NORMA J. CARR,

Plaintiff,

v. CIVIL ACTION NO. 93-C-72 K

JAMIE LYNN BROOKS and
JAMES E. BROOKS

Defendants.

ORDER

The 11th day of June, 1993, came the plaintiff, Norma J. Carr, by G. Charles Hughes, of G. Charles Hughes, L.C., of her counsel, and as well came the defendants, Jamie Lynn Brooks and James E. Brooks, by V. Tad Greene, of Jackson & Kelly, their counsel, and by Walter M. Jones, III, of Martin & Seibert, L.C. (counsel for Allstate Insurance Company, the "notice-defendant" and the plaintiff's underinsurance carrier), pursuant to the "Plaintiff's Combined Motions" and the defendants' bifurcation motion, to-wit:

(1) the plaintiff's MOTION FOR A SINGLE ANSWER;

(2) the plaintiff's MOTION FOR ALLSTATE INSURANCE COMPANY TO MAKE ELECTION PURSUANT TO W.VA. CODE 33-6-31(d);

(3) the plaintiff's MOTION FOR PROTECTIVE ORDER;

(4) the plaintiff's MOTION TO STRIKE AFFIRMATIVE DEFENSES FIRST THROUGH SEVENTH AND FOURTEENTH AND MOTION FOR SANCTIONS;

(5) the defendants' MOTION TO BIFURCATE ISSUES OF LIABILITY AND DAMAGES;

previously filed, served, argued, briefed and submitted for decision following the consolidated hearing thereon of 7 May 1993.

Whereupon, for the reasons spread upon the record, the rulings of the Court upon the foregoing motions - in the same order of arrangement - were as follows:

(1) granted (a unified defense on the merits being contemplated);

(2) granted; said election to be made by Allstate Insurance Company on or before 11 July 1993;

(3) granted; said discovery not to be duplicative;

(4) granted, in part; the "Third Affirmative Defense" (re lack of subject matter jurisdiction), the

"Fourth Affirmative Defense" (re lack of personal jurisdiction), the "Fifth Affirmative Defense" (re improper venue), and the "Sixth Affirmative Defense" (re insufficiency of process and service of process), being without merit and somewhat frivolous, are hereby stricken; the plaintiff's motion for sanctions being hereby denied;

(5) denied;

and it is so ADJUDGED and ORDERED.

Whereupon, in response to the representation of counsel for Allstate Insurance Company that issues similar to those addressed by motions (1), (2), (3) and (4), *supra*, and the rulings thereon, were currently pending before the Supreme Court of Appeals of West Virginia - upon a provisional writ issued in the case of *State Auto*

Mutual Insurance Company v. Steptoe, Judge, et al - the Court indicated that in the event the Supreme Court resolved one or more of said issues in a manner contrary to the foregoing rulings, the same could be rescheduled for hearing, and it is so ADJUDGED and ORDERED.

Whereupon, this came on for the status conference previously noticed, the results of which are set forth in a separate order.

To all of which action of the Court, the plaintiff, defendants and Allstate Insurance Company - as their interests may be adversely affected - object and except.

Dated the *28th* day of June, 1993.

/s/ Mark A. Karl
Judge

APPROVED FOR ENTRY:

/s/ G. Charles Hughes
For the Plaintiff

/s/ Donald M. Kresen
For the Defendants

/s/ Walter M. Jones, III
For Allstate Insurance Company

APPENDIX, TAB "G"

No. _____

IN THE SUPREME COURT
OF APPEALS OF WEST VIRGINIA
At Charleston

ALLSTATE INSURANCE COMPANY,
A Corporation,

Petitioner,

v.

MARK A. KARL, Judge, Circuit Court
of Marshall County, West Virginia,

Respondent.

From Proceedings In The Circuit Court Of
Marshall County, West Virginia
Civil Action No. 93-C-72-K

PETITION FOR WRIT OF PROHIBITION

MARTIN & SEIBERT, L.C.

/s/ Walter M. Jones, III
Walter M. Jones, III
Paul B. Weiss
Post Office Box 1286
119 South College Street
Martinsburg, WV 25401
(304) 267-8985

Counsel For Petitioner

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STATEMENT OF FACTS AND PROCEEDINGS BELOW

This matter arises from the case of *Norma J. Carr v. Jamie Lynn Brooks and James G. Brooks*, Civil Action No. 93-C-72-K, now pending in the Circuit Court of Marshall County, West Virginia and hereinafter referred to as the "pending action." The pending action arises from an automobile collision in which it is alleged that the Defendants, Jamie Lynn and James G. Brooks, negligently caused injury to the Plaintiff Norma J. Carr. The Petitioner is the automobile insurer of the Plaintiff and provides uninsured and underinsured motorist coverage to the Plaintiff. On the premise that the Plaintiff's damages incurred in the subject collision exceed or might exceed the automobile liability insurance coverage available to the Defendants, thereby invoking her underinsured motorist coverage, the Petitioner was duly served with notice of the pending action pursuant to West Virginia Code § 33-6-31(d).

Upon receipt of the Summons and Complaint, the Petitioner filed an Answer to the Plaintiff's Complaint on its own behalf and on behalf of the interests of the Defendants, Jamie Lynn and James G. Brooks. The Defendants thereafter appeared by counsel and filed an Answer on their own behalf. In addition, the Petitioner propounded upon the Plaintiff interrogatories and requests for production of documents pursuant to Rules 33 and 34, of the West Virginia Rules of Civil Procedure. The Defendants had not undertaken such discovery at the time of the hearing upon the Motions which give rise to the Order from which this Petition arises.

On March 23, 1993, the Plaintiff filed four motions, the granting of which by the Respondent is the grievance advanced in the present Petition. Plaintiff's first motion was

to limit the alleged tortfeasor Defendants and the Petitioner to a single answer to the Plaintiff's Complaint. *Appendix, Tab 1*. As framed, the Plaintiff sought to prevent the alleged tortfeasor

Defendants from filing their Answer subsequent to the filing of the Petitioner's Answer. The Petitioner's Answer was filed on its own behalf and on behalf of the interests of the Defendants.

Plaintiff, in her second motion, sought to compel the Petitioner to make an irrevocable election as to "whether it is appearing in its own name or in the name of the defendants" in the pending action. *Appendix, Tab 2.* The Plaintiff further asserted that the Petitioner would be entitled to conduct discovery only if it elected to appear in its own name in the pending action. *Id.* It is further the Plaintiff's position that such an action would subject the Petitioner to discovery. *Id.* As a companion to this, the Plaintiff filed a motion for a protective order, R.C.P., Rule 26, whereby she sought to avoid responding to the discovery requests propounded by the Petitioner. *Appendix, Tab 3.* Her rationale is that, if the Petitioner were appearing on behalf of the interests of the alleged tortfeasor Defendants, discovery could only be conducted by either the Petitioner or the alleged tortfeasor Defendants (but not both) so as not to duplicate discovery. *Id.*

In her fourth motion, the Plaintiff sought to strike eight affirmative defenses asserted in the Petitioner's Answer in its own behalf and on behalf of the interests of the alleged tortfeasor Defendants and to subject the Petitioner to sanctions pursuant to R.C.P., Rule 11 for raising the aforesaid defenses.[1] The affirmative defenses which were reserved in the Answer were: failure to state a claim against Petitioner upon which relief may be granted and failure to state a claim against Defendants upon which relief may be granted, lack of

subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficiency of process, insufficiency of service of

[1]This motion is not appended to this Petition due to its length and the page limitation imposed by the Rules of Appellate Procedure. Like the Plaintiff's other motions, the argument supporting the motion to strike contains no factual support upon which the court could make any findings relative to the basis of the asserted and reserved defenses.

process, and all "policy defenses" arising under the contract of insurance between the Petitioner and the Plaintiff.

All of the aforesaid motions were opposed in a consolidated Opposition filed by the Petitioner. The alleged tortfeasor Defendants did not file any memorandum. Hearings were held on May 7, 1993 and June 11, 1993, before the Respondent. In the interim, the Petitioner filed a supplemental brief in opposition to the consolidated motions advanced by the Plaintiff. By Order entered by the Respondent on June 28, 1993, the Plaintiff's first three motions were granted and her fourth motion granted in part and denied in part. *Appendix, Tab 4.* It is the Petitioner's position that the granting of the aforesaid motions was erroneous and that proceeding with the pending action as it is postured by the granting of the aforesaid motions would constitute a grievous denial of the Petitioner's due process rights pursuant to the fifth and fourteenth amendments to the United States Constitution and Article III, § 10 of the West Virginia Constitution. Accordingly, the Petitioner respectfully prays that the Respondent be prohibited from denying the Petitioner's due process rights by proceeding with the pending action as postured by the Respondent's erroneous granting of the Plaintiff's motions, and that the ruling of the Circuit Court of Marshall County be reversed.

Assignments Of Error

1. The Petitioner's rights to procedural due process will be violated if compelled to proceed with the pending action as postured in light of the Respondent's Order forcing the Petitioner to make an irrevocable election as to whether it appears in the pending action in its own name or in the name of the Defendants.

2. The Petitioner's rights to procedural due process will be violated if compelled to proceed with the pending action as postured in light of the Respondent's Order permitting the Petitioner discovery pursuant to the Rules of Civil Procedure only if it elects to appear in the pending action in its own name or, if not appearing in its own name, conducts discovery only in conjunction with the Defendants.

3. The Petitioner's rights to procedural due process will be further violated if compelled to proceed with the pending action as postured in light of the Respondent's Order subjecting the Petitioner to a "unified defense on the merits" of the pending action in conjunction with the Defendants.

4. The Petitioner's rights to procedural due process will also be violated if compelled to proceed with the pending action as postured in light of the Respondent's Order striking affirmative defenses reserved by the Petitioner.

5. The Petitioner's right to procedural due process will be violated if compelled to proceed with the pending action as postured in light of the cumulative effects of all or some combination of the foregoing Orders.

POINTS & AUTHORITIES

I. PREFACE.

Since the inception of underinsured motorist ("UIM") coverage in the 1960's, courts have struggled with a number of nettlesome problems presented by the relationships and conflicts inherent in the posture of a UIM case. One of the first considerations was to avoid the multiplicity of lawsuits which ordinarily would occur if the Plaintiff first must obtain a judgment against the tortfeasor and then, upon exhaustion of the tortfeasor's liability insurance, look to his UIM insurer which, then, might contest the original tortfeasor's liability to the Plaintiff and/or the extent of the Plaintiff's damages. Absent a means by which the UIM insurer might be bound by the judgment in the underlying tort claim, the Plaintiff might be required to relitigate his entire case in seeking compensation from his UIM carrier.

It is, of course, axiomatic of procedural due process that a judgment cannot bind one who had no notice of or opportunity to defend the action from which the judgment derives. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971); 16A AM. JUR.2D, *Constitutional Law*, § 843 (1979 & Supp. 1993). Thus, the typical procedural mechanism established to render the judgment in the underlying tort action conclusive upon the UIM carrier holds that the carrier is estopped from attacking it if it had notice of the underlying tort action and opportunity to vindicate its interests therein. The courts, in those jurisdictions where this type of procedural mechanism was judicially established, recognized that such tripartite litigation contains inherent conflicts of interest between the insurer and the insured, *see, e.g., Vernon Fire & Cas. Ins. Co. v. Matney*, 170 Ind. App. 45, 351 N.E.2d 60 (1976), and

between the UIM carrier and the alleged tortfeasor defendant, *see, e.g., Alsbach v. Bader*, 616

S.W.2d 147 (Mo. App. 1981),[2] but generally held that, as a matter of public policy, avoidance of a multiplicity of suits is to be desired over the avoidance of these conflicts. *Vernon Fire & Cas. Co.*, 170 Ind. App. 45, 351 N.E.2d 60. The courts also recognized that the UIM carrier's interests are often unprotected or less-than-fully protected in this arena where the underlying tort action is sometimes collusive in nature and otherwise less-than-vigorously contested.[3] *See, e.g., Waters v. United States Fidelity & Guar. Co.*, 328 Md. 700, 616 A.2d 884 (1992) (intervention is a means of protecting against collusion or inappropriate settlements between insureds and tortfeasors); *Briggs v. American Family Mut. Ins. Co.*, 833 P.2d 859 (Colo. 1992) (collusion).

The mechanism employed by the majority of the states is to permit the UIM carrier, upon receiving notice of the suit, to intervene in the underlying action pursuant to the governing rules of civil procedure, many of which are similar in application to Fed. R. Civ. P. 24 and R.C.P., Rule 24, and to hold that its failure to intervene effectuates a waiver of its right to do so, thus making the judgment binding as to the UIM carrier. *See, e.g., Vernon Fire & Cas. Co.*, 170 Ind. App. 45, 351 N.E.2d 60; *Terzian v. California Cas. Indem. Exch.*, 42 Cal. App.3d 942,

[2]While the UIM carrier and the alleged tortfeasor might have a community of interest in defeating the plaintiff/insured's claim altogether, the UIM carrier is also adverse to the alleged tortfeasor defendant. It is, economically, a matter of no interest to the UIM carrier whether the plaintiff/insured's claim is defeated altogether or whether the plaintiff/insured prevails within the limits of the alleged tortfeasor's liability insurance. In either event, the UIM carrier does not have to pay. Likewise, if the UIM carrier does have to pay, it will typically be subrogated to the plaintiff/insured's right to proceed against the alleged tortfeasor to recover any UIM payments it has made, thereby compounding the adversity between the UIM carrier and the alleged tortfeasor defendant.

[3]As argued in this Petitioner's Supplemental Brief in Opposition to the Plaintiff's Consolidated Motions, UIM litigation is often between friends, relatives or acquaintances and involves a tortfeasor defendant whose interests may be aligned with those of the plaintiff to a greater or lesser degree. In other instances, it may involve an absent defendant or a nominal defendant who has previously settled with the plaintiff, leaving the UIM carrier as the "true defendant." Thus, even where collusion *per se* might be absent, there are numerous instances in which the alignment of the parties' interests is less than truly adversarial. Even where true adversity exists, numerous due process questions would be raised by binding the UIM carrier's defense to that of the alleged tortfeasor where the UIM carrier might have serious disagreement with the defense strategy to be employed or the vigor or competency with which it is pursued.

117 Cal. Rptr. 284 (1974). By marked contrast, the West Virginia mechanism, wherein the right of the UIM carrier to intervene is *statutorily* enacted, is one that is employed in a substantial minority of jurisdictions centered principally in this region of the country. W. VA. CODE ANN. § 33-6-31(d); GA. CODE ANN. § 33-7-11; MISS. CODE ANN. § 83-11-105; N.C. GEN STAT. § 20-279.21(b)(3); S.C. CODE ANN. § 38-77-150; TENN. CODE ANN. § 56-7-1206; VA. CODE ANN. § 38.2-2206. *See also* KAN. STAT. ANN. § 40-284(e) (UM carrier may write coverage exclusion where suit filed against uninsured motorist without notice to carrier); MD. RULE BW4 (service upon Maryland Automobile Insurance Fund).

Thus, authority from jurisdictions which have *judicially* recognized a UIM carrier's right to intervene in the underlying tort action or where that right is governed by rules of civil procedure rather than statute, while generally educational, is irrelevant to the issue now before this Court. This is particularly true of those numerous cases which construe the nuances of the rules of civil procedure governing the UIM carrier's right to intervene.[4] Of the statutory enactments governing the UIM carrier's right to intervene, the operative language of TENN. CODE ANN. § 56-17-1206 and VA. CODE ANN. § 38.2-2206 F. is almost-verbatim that of W.Va. Code § 33-6-31(d). Accordingly, cases construing these statutory enactments are particularly instructive as to the questions presented herein. By contrast, GA. CODE ANN. § 33-7-11, MISS. CODE ANN. § 83-11-105, N.C. GEN. STAT. § 20-279.21 and S.C. CODE ANN. § 38-77-150 differ substantially from W. VA. CODE ANN. § 33-6-31(d) and cases construing them would be less germane to the questions presented here.

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[4]Where intervention is governed by a variant, *e.g.*, of Federal Rule of Civil Procedure 24, as is the situation in numerous of the reported cases, considerations come into play which are not factors pursuant to § 33-6-31(d), notably whether the UIM carrier can demonstrate that, in the

absence of intervention, its interests are not adequately protected. This is a criterion under Rule 24 and its progeny, but not under § 33-6-31.

Against this backdrop, it is the Petitioner's position that W. VA. CODE ANN. § 33-6-31(d) is intended as an embodiment of the requirements of procedural due process. *Perkins v. Doe*, 177 W. Va. 84, 350 S.E.2d 711 (1986). If judgment rendered in an underlying tort action is to be binding upon it, a UIM carrier must be given notice and opportunity to protect its interests. Here, there is no question that the Petitioner was given notice and *some* opportunity to participate in the underlying tort action. However, the question presented is whether the Respondent has so restricted participation by the Petitioner so as to deprive it of any *meaningful* opportunity to protect its interests, thus denying it procedural due process. It is the Petitioner's position that the Order of the Respondent is directly contrary to W. VA. CODE ANN. § 33-6-31(d) and, therefore, constitutes a denial of rights guaranteed by the United States and West Virginia Constitutions. In petitioning this Court to construe W. VA. CODE ANN. § 33-6-31(d), the Petitioner concomitantly petitions this Court to address the constitutional question of what constitutes *meaningful* opportunity to be heard in this context.

II. PROHIBITION IS AN APPROPRIATE REMEDY IN THIS INSTANCE.

Prohibition lies as a matter of right where a lower court, having proper jurisdiction over a matter, exceeds its legitimate powers, W. VA CODE ANN. § 53-1-1, but cannot serve as a substitute for a writ of error or appeal. *Handley v. Cook*, 162 W. Va. 629, 252 S.E.2d 147 (1979). While, at first glance, it might appear that this Petitioner's attack on the Respondent's rulings upon the subject motions constitutes such an attempt at an interlocutory appeal, it must be borne in mind

that those rulings merely serve as a predicate for compelling this Petitioner to proceed with the pending action in a posture which this Petitioner contends is in violation of its

due process rights. The injury sought to be avoided is the expense of litigating a matter which, because of those rulings, would almost certainly result in appeal, reversal and retrial, to the economic detriment of all involved and at great waste of judicial resources. While it is necessary for this Court to consider the propriety of the challenged rulings in the disposition of this matter, the present Petition is not directed solely or even primarily to the error of those rulings, but to the position in which this Petitioner is cast as a result thereof. Unlike most cases involving true appeals, where the assignments of error occur at trial or in the later stages of litigation when the litigants have already been put to the full expense of litigating the matter, here the injury to be avoided is largely prospective insofar as the present matter is yet in the early stages of litigation. In this situation, Prohibition is an especially appropriate remedy for avoiding the costs to all of seeing to its conclusion a matter which is fatally flawed at the outset. *A fortiori*, the law offers no remedy whereby this Petitioner might recoup the costs of proceeding with the pending action in its flawed state and the injury which it would suffer is, thereby, irreparable.

Added to this absence of an available remedy at law is the nature and gravity of the grievance raised herein. It is commonly held that, for fourteenth amendment purposes, garden-variety errors of procedure or evidentiary rulings during the course of a trial do not typically rise to the level of a violation of procedural due process. *See., e.g., American R. Express Co. v. Kentucky*, 273 U.S. 269 (1927). By contrast, denial of a litigant's participation in a hearing which purports to be conclusive as to its rights is a fundamental due process violation. *Powell v. Alabama*, 287 U.S. 45 (1932).

It cannot result in "harmless error" which might later be overlooked, *Nevels v. Hanlon*, 656 F.2d 372 (8th Cir. 1972); *Scarnati v. Washington*, 599 F.

Supp. 1554 (M.D. Pa.), *aff'd*, 772 F.2d 896 (3d Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986); *Martino v. American Airlines, Inc.*, 404 F. Supp. 1202 (S.D.N.Y. 1975), *aff'd*, 573 F.2d 1292 (2d Cir. 1977), *cert. denied*, 439 U.S. 869 (1978); *In re Ralph Marcantoni & Sons, Inc.*, 62 B.R. 245 (D. Md. 1986), and any such denial of due process could not help but result in reversal upon appeal. *See also Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979) (prohibition is proper remedy in cases where there is a high probability of reversal if error is not corrected in advance).

Finally, Prohibition is governed by equitable principles, *Lyons v. Steele*, 113 W. Va. 652, 169 S.E. 481 (1933), requiring generally that the litigant seeking the writ have no adequate remedy at law. As heretofore argued, this Petitioner has no redress at law for the injury to be incurred in allowing the pending action to proceed in its flawed state. Accordingly, Prohibition is a proper and appropriate remedy in this matter to prevent prospective injury of great magnitude which is irrevocable in nature and for which the law offers no redress.

III. THE PETITIONER'S RIGHTS TO PROCEDURAL DUE PROCESS WILL BE VIOLATED IF COMPELLED TO PROCEED WITH THE PENDING ACTION AS POSTURED IN LIGHT OF THE RESPONDENT'S ORDER FORCING THE PETITIONER TO MAKE AN IRREVOCABLE ELECTION AS TO WHETHER IT APPEARS IN THE PENDING ACTION IN ITS OWN NAME OR IN THE NAME OF THE DEFENDANTS.

The Order issued by the Respondent granting the Plaintiff's motion to require the Petitioner to make an

irrevocable election as to whether it appears in the pending action in its own name or in the name of the alleged tortfeasor Defendants contains no findings of fact or conclusions of law, but perfunctorily grants the Plaintiff's motion. *Appendix, Tabs 2, 4.* As such, it must be presumed that it was the Respondent's intention to grant the subject motion in

its entirety, as it was posed by the Plaintiff. Incorporated in this motion are two concepts which are subsidiary to the premise that the Petitioner must make such an election at all: (1) that any such election would be irrevocable, and (2) that the Petitioner's right to conduct discovery in the pending action is contingent upon the Petitioner electing to proceed in its own name. *See also Appendix, Tab 3* (Petitioner entitled to conduct only "unified discovery" in conjunction with alleged tortfeasor Defendants unless appearing in its own name);[5] *Appendix, Tab 4* (granting the same). Each of these premises is directly contrary to the black-letter law of W. VA. CODE ANN. § 33-6-31(d) and is repugnant to the constitutional principles of due process and fundamental fairness.

W. VA. CODE ANN. § 33-6-31(d) provides that

> Any insured intending to rely on the coverage required by subsection (b) of this section shall, if any action be instituted against the owner or operator of an uninsured motor vehicle, cause a copy of the summons and a copy of the complaint to be served upon the insurance company issuing the policy, in the manner prescribed by law, as though such insurance company were named a party defendant; such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name.
>
> Nothing in this subsection shall prevent such owner or operator from employing counsel of his own choice and taking any action in his own interest in connection with such proceeding.

Nothing in this section, nor in any case construing it, states or suggests that the UIM carrier must make an election of any sort; that any such election is irrevocable once made;

or that a UIM carrier's rights to conduct discovery are in any way contingent upon making such

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[5]And thereby making the jury cognizant of the presence of insurance funds from which the Plaintiff may be compensated in contravention of W.V.R.E., Rule 411.

an election. It is apparently the position of the Plaintiff[6] and Respondent that the language of the first paragraph of W. VA. CODE ANN. § 33-6-31(d) permitting the UIM carrier "to file pleadings and to take other action allowable by law in the name of [alleged tortfeasor] *or* in its own name" requires such an election by negative inference. However, W. VA. CODE ANN. § 33-6-31(d) requires no such election. Rather, that *meaningful* opportunity to participate in an action which will affect its interests as required by procedural due process includes the opportunity to participate to the full extent contemplated by the Rules of Civil Procedure, and that *meaningful* opportunity includes participation characterized by all of the same rights and privileges afforded other litigants. It is incumbent upon the Respondent to clearly establish the legal basis for any limitation or qualification imposed upon the Petitioner's participation in the underlying action which would grant the Petitioner fewer rights than other litigants. No such basis, however, has been advanced.

It is clear that the UIM carrier's obligations will be conclusively determined in the underlying tort action provided it has been given notice thereof and an opportunity to participate. The Respondent has conditioned this Petitioner's right to participate in the underlying action by requiring the Petitioner to elect between its right to be immune from a direct action by the Plaintiff, *Davis v. Robertson*, 175 W. Va. 364, 332 S.E.2d 819 (1986) and *Plumley v. Allstate Ins. Co.*, 772 F. Supp. 922 (S.D.W.V. 1991), and its right to conduct the full measure of discovery to which it would otherwise be entitled pursuant to the Rules of Civil Procedure. Stated in the converse, the Petitioner is penalized for its failure to waive

its rights under *Davis* and *Plumley* by the imposition of restrictions upon its right to conduct discovery which have the

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[6]The Plaintiff advanced no legal argument whatsoever in support of her position that an election is required, *Appendix, Tab 1*, but, instead, took it as a given factor.

effect of denying the Petitioner the right to participate to the full extent otherwise allowed by the Rules of Civil Procedure and to a lesser extent than the right to participate enjoyed by the other litigants.

In the first instance, nothing in W. VA. CODE ANN. § 33-6-31(d) requires that the UIM carrier "appear" in any capacity whatsoever. The statute references *filing pleadings* and *taking other action allowable by law* -- not "appearance." From this it is eminently clear that the legislature, did not contemplate that the UIM carrier must or might participate in the underlying tort claim. This is amplified by the language chosen by the legislature relating to service of the summons and complaint upon the UIM carrier "*as though* such insurance company were a named party defendant." W. VA. CODE ANN. § 33-6-31(d) (emphasis added). Thus, any requirement that the UIM carrier must *appear* as a party or on behalf of any party in the underlying tort action is facially erroneous.

Notwithstanding such clear indication that the UIM carrier is not a contemplated actual or representative party to the underlying tort claim, the legislature, unequivocally and without qualification of any sort, granted UIM carriers the right to "file pleadings and to take other action allowable by law" in its own name or that of the alleged tortfeasor. Just as it is conclusively presumed that the plain language of the statute expresses the intent of the legislature enacting it, *United States v. American Trucking Ass'ns.*, 310 U.S. 534 (1940); *Osaka Shosen Kaisha Line v. United States*, 300 U.S. 98 (1937); *United States v. Kirby Lumber Co.*, 284 U.S. 1 (1931). *See also* 17 MICHIE'S JURISPRUDENCE, *Statutes* § 34 (1979 & Supp. 1992), cases cited at n.13; 73 AM. JUR.2D, *Statutes*, § 194 (1974 & Supp. 1993), it must be inferred that

the absence of any language qualifying or conditioning this right indicates that it was not the

intention of the legislature that any qualifications or conditions be imposed. Yet, the Respondent, upon no supporting legal argument, precedent or legal authority, seeks to place a price upon these rights -- that the Petitioner give up its immunity from direct action as preserved in *Davis v. Robertson*, 175 W. Va. 364, 332 S.E.2d 819 (1986) and *Plumley v. Allstate Ins. Co.*, 772 F. Supp. 922 (S.D.W.V. 1991). The cost to the Petitioner of preserving this right is that it be permitted to participate only in "unified discovery," -- either relying upon or working in conjunction with a tortfeasor defendant whose interests are directly adverse, at least in part, to it. It is clear that, within the context of the UIM action, the carrier stands on lesser footing and has fewer rights before the court than the other litigants.

There is nothing in the statute which suggests that it is intended that the UIM carrier suffer such an impairment to its due process right to defend its own interests. To the contrary, both the plain language of W. VA. CODE ANN. § 33-6-31(d) and those cases which construe it, notably *Davis* and *Plumley*, indicate the opposite -- that it is intended that the UIM carrier have the right to participate in the underlying tort action to the same extent as the actual parties thereto. Moreover, any arrangement which imposes such unequal treatment is facially suspect.

In *Fyke v. Clark*, No. 89-98-II (Tenn. Ct. App. Dec. 6, 1989) (1989 WL 146736)(1989),[7] the court rejected the identical argument presented here in holding that the identical Tennessee statute, TENN. CODE ANN. § 56-7-1206, does not require the UIM carrier to make such an election. In accord with *Davis* and *Plumley*, the court in *Webster v. Harris*, 727 S.W.2d 248 (Tenn. App. 1987), opined that TENN. CODE

ANN. § 56-7-1206 was enacted in part to preserve to the UIM carrier the same right of anonymity enjoyed by liability insurance

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[7]Included herewith for the convenience of the Court at *Appendix, Tab 5.*

carriers, the purpose of which would be defeated if the UIM carrier were to be named as a party. Interpreting the identical Virginia statute, VA. CODE ANN. § 38.2-2206, it has been held that the UIM carrier is not a party to the action, *Zurenda v. Holloman*, 616 F. Supp. 212 (E.D. Va. 1986), and that injection of insurance into the case is prejudicial error. *Travelers Ins. Co. v. Lobello*, 212 Va. 534, 186 S.E.2d 80 (1972).

Accordingly, the Plaintiff's position, as adopted by the Respondent, that the Petitioner must make an election as to whether to appear in its own name or in the name of the alleged tortfeasor Defendant, is erroneous and the consequences attached by the Respondent to the making or failure to make such an election render it an egregious violation of the due process clauses of the United States and West Virginia Constitutions.

IV. THE PETITIONER'S RIGHTS TO PROCEDURAL DUE PROCESS WILL BE VIOLATED IF IT IS COMPELLED TO PROCEED WITH THE PENDING ACTION AS POSTURED IN LIGHT OF THE RESPONDENT'S ORDER PERMITTING THE PETITIONER DISCOVERY PURSUANT TO THE RULES OF CIVIL PROCEDURE ONLY IF IT ELECTS TO APPEAR IN THE PENDING ACTION IN ITS OWN NAME OR, IF NOT APPEARING IN ITS OWN NAME, CONDUCTS DISCOVERY ONLY IN CONJUNCTION WITH THE DEFENDANTS.

In his Order granting the Plaintiff's motion for protective order pursuant to R.C.P., Rule 26, the Respondent made no findings of fact or conclusions of law, but perfunctorily granted it without discussion. *Appendix, Tabs*

3, 4. As such, it must be supposed that the Respondent adopted the rationale as set forth in the Plaintiff's motion. That "rationale," is presumably based in the argument that (1) "Allstate Insurance Company is attempting to conduct discovery which most assuredly will duplicate" discovery which would, in the future, be filed by the alleged tortfeasor Defendants; (2) the Petitioner, having no direct knowledge of the collision giving rise

to the pending action, would be unable to reciprocate by providing the Plaintiff with any "meaningful type of discovery;" and (3) if the Petitioner appears in the pending action on behalf of the tortfeasor Defendants, unified discovery must be conducted by either the Petitioner or the tortfeasor Defendants, but not both. *Appendix, Tab 3* at 1-2.[8] Based upon this rationale, the Respondent has issued an Order which severely restricts this Petitioner's right to participate in the pending action -- a proceeding which purports to foreclose, in whole or in part, its rights -- in violation of W. VA. CODE ANN. § 33-6-31(d) and denies this Petitioner meaningful opportunity to be heard, in violation of the due process clauses of the United States and West Virginia Constitutions.

With regard to the first prong of her rationale, the Plaintiff clairvoyantly argues that the discovery filed by this Petitioner would "most assuredly" duplicate discovery requests to be filed in the future by the alleged tortfeasor Defendants. The Plaintiff (and Respondent) offer no rationale whatsoever -- legal or otherwise -- as to why it is the present discovery requests which must yield to those which might or might not be propounded by another party in the future.

Secondly, the Plaintiff (and Respondent) seek to rationalize denying this Petitioner full opportunity, to discover all facts and evidence upon which the Plaintiff bases her claims because the propounding party cannot reciprocate with "meaningful discovery" -- This premise is directly contrary to R.C.P., Rules 1, 26, 27, 28, 29 30, 31, 32, 33, 34, 35, 36 and 37, as well as W. VA. CODE ANN. 33-6-31(d), not a single one of which expressly or impliedly imposes any such condition or any remotely similar condition upon a litigant's

right to participate in full discovery. Simply put, discovery is not a bargained exchange wherein one's entitlement is roughly

[8]By negative inference, if the Petitioner appears in its own name, it is entitled in its own right to the full measure of discovery contemplated by the Rules of Civil Procedure. *See Appendix, Tab 2*; *supra*, argument at III.

equivalent to what one may offer in return and the Plaintiff (and Respondent) are simply wrong in believing that the quantity and quality of any discoverable information which the Petitioner may possess is in any way relevant to the question of whether it is entitled to participate in discovery. Such an irrelevant consideration may not serve as a basis for the issuance of a protective order. This logic has the effect of denying this Petitioner procedural due process by relegating it to the position of a "second class litigant" which may be denied discovery or whose participation in discovery may be limited or qualified by the court.

The third leg of Plaintiff's (and Respondent's) "rationale" advocates a forthright denial of those due process rights. Here, the Plaintiff (and Respondent) insist that, if this Petitioner does not to waive its right to be free of a direct action against it by the Plaintiff, as per *Davis v. Robertson*, 175 W. Va. 364, 332 S.E.2d 819 (1986) and *Plumley v. Allstate Ins. Co.*, 772 F. Supp. 922 (S.D.W.V. 1991), it must, if it is to have discovery at all, form an alliance with parties whose interests are adverse to it because only the tortfeasor defendant or the UIM carrier, but not both, may conduct discovery.

Nowhere is the fallacy of the Plaintiff's position more clearly illustrated than in applying it to discovery between the Petitioner and the alleged tortfeasor Defendants. As previously noted, while both the UIM carrier and the alleged tortfeasor defendant share an interest in defeating the plaintiff's claim altogether, the outer limit of the UIM carrier's interest is in preventing the Plaintiff from obtaining a judgment in *excess* of the alleged tortfeasor defendant's liability coverage. It is a matter of no interest to the UIM carrier if the alleged tortfeasor defendant is found liable to the plaintiff within the limits of his liability coverage and, in

certain situations, it might be to the UIM carrier's advantage to assist the plaintiff in obtaining such a

judgment in order to protect itself or minimize its liability. Similarly, the alleged tortfeasor's motivation to defend is limited by the extent of his liability coverage in most instances. In all instances, the question of the defendant's assets are of concern to the UIM carrier, as is the protection of its right of subrogation.

Thus, the Plaintiff (and Respondent) bluntly deny this Petitioner's right to independent discovery -- ostensibly because responding to discovery propounded by both the alleged tortfeasor Defendants and the UIM carrier would be burdensome to the Plaintiff. Neither the Plaintiff nor the Respondent point out how this might be more burdensome than would be the necessity of responding to discovery propounded by different alleged tortfeasors where a plaintiff elects to sue multiple tortfeasors who are not in privity of interest or where third-party defendants are impleaded. Neither the Plaintiff nor the Respondent suggest that multiple defendants are to be subjected to "unified discovery." Moreover, neither the Plaintiff nor the Respondent distinguishes or can distinguish the present action, where the Plaintiff seeks to establish the liability for damages of both this Petitioner a[illegible]he tortfeasor, from a "multiple tortfeasor" action wherein a plaintiff seeks to establish the liability of multiple tortfeasors for damages. Particularly noteworthy is the absence of any real "burden" upon the Plaintiff since no discovery had been filed by the alleged tortfeasor Defendants at the time of the granting of the protective order.

Both W. VA. CODE ANN. § 33-6-31(d) and the numerous Rules of Civil Procedure which address discovery contemplate that litigants shall be on equal footing with regard to discovery and that there be no "privileged" or

"underprivileged" classes of litigants. This attempt by the Plaintiff and the Respondent to create such a distinction and relegate this Petitioner to the

underprivileged class is an egregious violation of procedural due process, as would be any attempt to "tie one hand behind a litigant's back" by granting an advantage or imposing a disadvantage to one litigant which is not enjoyed by all litigants.

V. THE PETITIONER'S RIGHTS TO PROCEDURAL DUE PROCESS WILL BE FURTHER VIOLATED IF COMPELLED TO PROCEED WITH THE PENDING ACTION AS POSTURED IN LIGHT OF THE RESPONDENT'S ORDER SUBJECTING THE PETITIONER TO A "UNIFIED DEFENSE ON THE MERITS" OF THE PENDING ACTION IN CONJUNCTION WITH THE DEFENDANTS.

The Plaintiff (and Respondent) further seek to penalize this Petitioner by impairing its right to participate in the action at all. Solely because this Petitioner is a UIM carrier against whom a direct action may not be maintained, the Plaintiff and Respondent seek to require it, to present a "unified defense on the merits" to the Plaintiff's claim on the "rationale" that it would be unfair to subject a plaintiff, who has elected to sue multiple defendants for significant sums of money, to inconsistent responses, answers or defenses which such diverse defendants might assert. *Appendix, Tabs 1, 4.*

Meaningful opportunity to defend, as required by due process, encompasses nothing less than the opportunity to present every available defense. *Lindsey v. Normet*, 405 U.S. 56 (1972); *American Sur. Co. v. Baldwin*, 287 U.S. 156 (1932). To hold that diverse litigants must present a "unified defense on the merits" is precisely to deny each of them those defenses in which the other does not concur. At minimum, it reduces the ability of both to defend to a "least common

denominator" and at worst, such as where there are crossclaims between them, paralyzes the duty of either to defend at all. In either event, it denies both of them the full measure of due process.

In order to comprehend just how egregious a violation of due process occurs here, it is necessary only to consider that numerous UIM actions involve, if not collusive claims, situations in which the defendant is a friend, relative or associate of the plaintiff and not in the least adverse to the plaintiff being awarded a substantial judgment -- particularly where the alleged tortfeasor defendant is otherwise "judgment proof." To hold that the UIM carrier may not independently assert any defense which is available to it, but may only assert those defenses with which the tortfeasor defendant, in sympathy with the plaintiff, agrees would be to limit it to only those defenses of which the plaintiff directly or indirectly approves.

Here again, the Plaintiff and the Respondent fail to offer any rationale or authority for the disparate treatment imposed upon this Petitioner, as a UIM carrier, from the treatment that would be afforded a litigant who was alleged to be a joint tortfeasor.

VI. THE PETITIONER'S RIGHTS TO PROCEDURAL DUE PROCESS WILL ALSO BE VIOLATED IF COMPELLED TO PROCEED WITH THE PENDING ACTION AS POSTURED IN LIGHT OF THE RESPONDENT'S ORDER STRIKING AFFIRMATIVE DEFENSES RESERVED BY THE PETITIONER.

In his Order, the Respondent struck this Petitioner's affirmative defenses, which it sought to reserve to the extent of the interests of the tortfeasor Defendants, of lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficiency of process and insufficiency of service of process on the basis that they were "somewhat frivolous."

Appendix, Tab 4 at 4. It is interesting that the affirmative defenses were stricken in the absence of any supporting evidence or findings of fact -- all being upon the motion of the Plaintiff. Neither the alleged tortfeasor Defendants nor the Petitioner moved to dismiss the Plaintiff's claim. This again contravenes W. VA. CODE ANN. § 33-6-31(d) and effectuates a waiver of the carrier's

right to assert those defenses on behalf of the alleged tortfeasor in violation of the UIM carrier's due process rights.

If the UIM carrier fails to assert such defenses, they are waived. R.C.P., Rule 12(h)(1). If the UIM carrier, as did this Petitioner, asserts such defenses for the purpose of reserving them subject to the later development of information which would establish or refute their applicability,[9] it risks their being dismissed by the court as "frivolous" based upon the UIM carrier's inability to substantiate them at that point in time. Most often, the UIM carrier not only often lacks sufficient information at the time of answering to make a determination whether any of the Rule 12(h) defenses might be available, but lacks the means of developing such information except through the discovery process. To prohibit the UIM carrier from asserting all potential defenses places the carrier in a "Catch-22" situation in that it may waive a viable defense, thereby impeding its interest and subjecting it to sanctions or it may assert a defense which may later be proved, but stricken -- again subjecting it to sanctions.

The UIM carrier, not being a natural person, necessarily must be represented by counsel who is constrained by the tenets of professional ethics. Where the alleged tortfeasor is represented by counsel, these tenets prevent the UIM carrier, by its counsel, from contacting the alleged tortfeasor to ascertain the facts which would substantiate or refute the applicability of the Rule 12(h) defenses. In a "John Doe" suit, there is no alleged tortfeasor available from whom the facts supporting or refuting the applicability of these

defenses might be ascertained at that time. Thus, it is only where the UIM carrier has fully developed prior to suit independent

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[9]Commonly the UIM carrier has no direct knowledge of the alleged tortfeasor's residence, which is relevant to the question of venue, the manner in which the alleged tortfeasor was served with process, the sufficiency *vel non* of the process with which the alleged tortfeasor was served or the alleged tortfeasor's contacts with the forum as they relate to personal jurisdiction.

knowledge of the facts or where the alleged tortfeasor, either proceeding *pro se* or represented by counsel, elects to cooperate with the UIM carrier that the necessary factual information may be determined prior to discovery. In that majority of cases which do not fall into either of these categories, denial of the opportunity for the UIM carrier to reserve the Rule 12(h) defenses until sufficient facts can be developed amounts to a forced waiver of these defenses which might otherwise be available to the UIM carrier if given the opportunity to develop the supporting information.

As previously noted, procedural due process requires that the litigant be given the opportunity to present every available defense. *Lindsey v. Normet*, 405 U.S. 56 (1972); *American Sur. Co. v. Baldwin*, 287 U.S. 156 (1932). In the normal lawsuit between parties who have knowledge of the events upon which it is based, the standard apparently applied by the Respondent for dismissal of the Rule 12(h) defenses has efficacy. However, in the hybrid form of litigation presented by the combined tort/UIM suit, it amounts in most instances to a denial of the UIM carrier's due process right to assert these defenses based solely upon its status and the limitations attendant upon that status. This is especially so where there is an absentee ("John Doe") tortfeasor defendant, where the underlying claim might be collusive or where the tortfeasor defendant's interests are aligned with those of the plaintiff. In any of these events, there is no other litigant who would have the motivation to vigorously assert available affirmative defenses, including the Rule 12(h) defenses. The end result is that the UIM carrier, as here, has been denied the opportunity to assert available defenses in violation of its due process rights.

VII. THE PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS WILL BE VIOLATED IF COMPELLED TO PROCEED WITH THE PENDING ACTION AS POSTURED IN LIGHT OF THE CUMULATIVE EFFECTS OF ALL OR SOME COMBINATION OF THE FOREGOING ORDERS.

To the extent that each or any of the foregoing aspects of the Respondent's Order do not rise to the level of a due process violation in and of themselves, the combined effect of them does. Here, the Petitioner is compelled in light of these Orders not only to proceed with the pending action without the ability to assert affirmative defenses which may be applicable, but to either waive its substantive rights under *Davis v. Robertson*, 175 W. Va. 364, 332 S.E.2d 819 (1986) and *Plumley v. Allstate Ins. Co.*, 772 F. Supp. 922 (S.D.W.V. 1991), or be relegated to the status of a "second class litigant," not entitled to the full benefit of discovery and not permitted independently to assert defenses without the concurrence of the alleged tortfeasor defendants. The fundamental unfairness of the impediments to protecting its own interests with which this Petitioner has been burdened by the Respondent shocks the conscience and is an absolute denial of this Petitioner's procedural due process to a meaningful opportunity -- to protect its interests. *Hannah v. Larche*, 363 U.S. 420 (1960) (due process embodies rules of fair play); *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977) (fundamental requirement of due process is opportunity to be heard in a meaningful manner); *Felhaber v. Felhaber*, 681 F.2d 1015 (5th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (serious departure from established modes of procedure can render judgment void for violation of due process). Simply put, this Petitioner cannot, consistent with any known concept of fairness, equality of treatment or

impartiality, be compelled to proceed with the pending action as it is postured in view of the Respondent's Order qualifying and imposing conditions upon the Petitioner's right to participate therein. This Order and the position in which it casts the

Petitioner are a blatant and abhorrent affront to the bedrock principles upon which the Constitutions of the United States and of this state are founded and the pending action cannot be permitted by this Honorable Court to go forward in light of such violations.

CONCLUSION

For the reasons stated herein, the Petitioner respectfully prays that this Honorable Court issue a Writ of Prohibition forbidding the Respondent from going forward with the case of *Carr v. Brooks*, Civil Action No. 93-C-72-K, now pending in the Circuit Court for Marshall County, West Virginia, in any posture other than one which grants to this Petitioner the full measure of rights enjoyed by any other litigant under the Rules of Civil Procedure and that the Respondent be prohibited from enforcing, in whole or in part, his Order of June 28, 1993 granting the Plaintiff's Motion for Single Answer, the Plaintiff's Motion for Protective Order, the Plaintiff's Motion for Allstate Insurance Company to Make an Election Pursuant to W. VA. CODE ANN. § 33-6-31(d) and the Plaintiff's Motion to Strike Certain Affirmative Defenses, each of which limit, qualify and condition the Petitioner's rights to participate in the pending action in violation of the due process clauses of the fifth amendment to the United States Constitution, the fourteenth amendment to the United States Constitution and Article III, § 10 of the West Virginia Constitution.

ALLSTATE INSURANCE COMPANY
BY COUNSEL

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MARTIN & SEIBERT, L.C.

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CERTIFICATE OF SERVICE

I, Walter M. Jones, III, Counsel for the Defendant, Allstate Insurance Company, hereby certify that I served a true copy of the foregoing **Petition for Writ of Prohibition** upon the following individuals by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 29th day of June, 1993:

Hon. Mark A. Karl, Judge
Circuit Court of Marshall County
2d Judicial Circuit
Marshall County Courthouse
Moundsville, WV 26041

G. Charles Hughes
G. Charles Hughes, L.C.
P. O. Box 871
Moundsville, WV 26041

Robert P. Fitzsimmons
Fitzsimmons & Parsons, L.C.
2003 Warwood Avenue
Wheeling, WV 26003

Donald M. Kresen
Jackson & Kelly
P. O. Drawer 68
New Martinsville, WV 26155

/s/ Walter M. Jones, III
Walter M. Jones, III

APPENDIX, TAB "H"

21818

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL ALLSTATE INSURANCE COMPANY, a corporation,

Petitioner,

v.

HONORABLE MARK A. KARL, Judge of the Circuit Court of Marshall County; JAMIE LYNN BROOKS and JAMES E. BROOKS,

Respondents.

PLAINTIFF'S MEMO IN OPPOSITION TO PROVISIONAL RULE

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Counsel for the Plaintiff

I.

STATEMENT OF THE CASE

(A) The Factual Backdrop

In the afternoon hours of 17 October 1991, the plaintiff, Norma J. Carr, a 56-year old widow (hereafter "Ms. Carr") - while walking home and crossing Jefferson Avenue at its intersection with Fifth Street in the heart of Moundsville - was struck by a car owned by the defendant, James E. Brooks, and operated by his 18-year old daughter, the defendant, Jamie Lynn Brooks (hereafter "Miss Brooks"). According to her signed statement within the WV Uniform Accident Report - produced by the defendants in response to the first set of Ms. Carr's document requests - Miss Brooks told the investigating officer that she did not see Ms. Carr ". . . until she was on my car."

Catapulted from the hood of that car onto the pavement, Ms. Carr suffered serious and disabling injuries including, *inter alia*, brain damage and reflex sympathetic dystrophy resulting from the trauma-induced disturbance of the autonomic nervous system of the left upper limb.[1] Following her hospitalization, she spent months in out-patient physical therapy at the same facility. Despite these therapeutic oblations, however, future surgery (followed by an additional year of intensive therapy) will be required if significant function is to be restored to her arm and hand. To date, Ms. Carr's medical expenses approximate $25,000.00. She remains under the care of a plastic surgeon and psychiatrist, as well as her family doctor.

---

[1]Specifically, Ms. Carr's injuries included: a cerebral concussion; a contusion of the left parietal lobe of the brain (demonstrable on CT Scan); a fractured rib; a Volkmann's ischemic contracture; multiple and extensive abrasions and contusions of the face, head, chest, abdomen and extremities; lacerations of the right lower and upper eyelids, the forehead, left cheek and in the area of the left eyelid or eyebrow; contusions to the orbital areas; a subgaleal hematoma in the right frontotemporal area; soft tissue damage or ligamentous strain or sprain of the neck, shoulder and back; injuries to the left arm and wrist (with resultant reflex sympathetic dystrophy); and a psychological disorder that interdicts the ability to cross public streets unattended.

In late 1992, after marshalling the medical records and bills, together with detailed reports from her three primary physicians - and after voluntarily submitting Ms. Carr to a day-long examination at WVU by a neuropsychiatrist selected by State Automobile Mutual Insurance Company (hereafter "State Auto"), the liability insurance carrier for Miss Brooks - counsel for Ms. Carr tendered a settlement demand for the single limit of liability coverage ($250,000.00) provided by the Brooks' policy. No settlement offer was ever made in response thereto. Unrequited, Ms. Carr filed suit against Miss Brooks and her father in the Circuit Court of Marshall County on 13 February 1993.

Instructed by *State Automobile Insurance Co. v. Youler*, 183 W.Va 556, 563, n. 7, 396 S.E.2d 737, 744 n. 7(1990), if not *Ara v. Erie Insurance Co.*, 182 W.Va. 266, 268, n. 5, 387 S.E.2d 320, 322, n. 5 (1989) - that adherence to the notice provisions of *W.Va. Code*, 33-6-31(d) [1988], is a *sine qua non* condition precedent to an injured party's reliance upon underinsured motorist coverage,[2] *see also Lusk v. Doe*, 175 W.Va. 775, 778, 338 S.E.2d 375, 378 (1985) - a copy of the summons and complaint also was caused to be served upon Allstate Insurance Company (hereafter "Allstate"),[3] a possible source of underinsurance coverage

[2]In Syllabus Point 1 of *Postlethwait v. Boston Old Colony*, ___ W.Va. ____, _____ S.E.2d _____ (slip op. 21347, June 28, 1993) - decided after the case at hand was filed - this Court held that *Code*, 33-6-31(d), requires service of a copy of the complaint upon the underinsurance carrier in the manner prescribed by law.

[3]The defendants and Allstate also were served with the discovery that was filed concurrently with Ms. Carr's complaint, *viz.*, two sets of interrogatories, one set of requests, and one set of requests to admit.

(hereafter "UIM" coverage) for Ms. Carr.[4] Unfortunately, having absorbed the admonition, and having complied with the statutory notice, Ms. Carr cannot now help but wonder at the mischief thus inspired.

(B) The Procedural History

Housed in eight separately numbered paragraphs spread over four pages, the allegations of Ms. Carr's complaint sound in conventional negligence (*see* Exhibit "1" hereto). Among other things, Ms. Carr averred:

> "(1) Defendants, Jamie Lynn Brooks and James E. Brooks, at all times material herein were residents of 102A Sandy Avenue, Moundsville, Marshall County, West Virginia.
>
> (2) Plaintiff, Norma J. Carr, was at all times material herein a resident of Marshall County, West Virginia.
>
> (3) At all times material herein, Defendant James E. Brooks was the owner of a 1987 Mercury Topaz automobile which he kept, maintained and used for the business and pleasure of his family members, including Jamie Lynn Brooks, who was a family member of Defendant James E. Brooks."

[4]Although Ms. Carr did not own a motor vehicle at the time of the collision, her adult son did. A resident of Ms. Carr's household at the time, the son maintained a liability policy through Allstate that provides $25,000.00 in UIM coverage.

These averments were admitted in the answer filed in due course by counsel selected by the defendants' liability insurer, State Auto. In addition, that answer contained the usual assortment of denials and affirmative defenses, not least comparative contributory negligence and comparative assumption of the risk.

Unfortunately, these familiar rites of passage ended with the refractory answer - seen all too frequently these days in cases involving underinsurance carriers[5] - that was filed by

[5]A host of reasons, few scientific or laudatory, can be found to explain the increased incidence of cases involving underinsurance carriers, as well as the type of answer and other efforts made here by Allstate. To begin with, the medical expenses associated with the treatment of the victims of automobile accidents are of a piece with the constantly escalating cost of this Nation's health care. In addition, the frequency, if not the severity, of automobile accidents continues to rise, albeit at a much less alarming rate than the attendant medical costs. It follows, of course, that the limits of many liability policies, thought to be more than sufficient as recently as a few years ago, increasingly have been shown to be inadequate.

Secondly, the discovery of a tortfeasor's status as an "underinsured" motorist can be a difficult undertaking for plaintiffs' lawyers. For example, this determination often depends upon the nature and extent of the plaintiff's injuries, including the economic consequences, none of which may have crystallized prior to suit. In addition, the limits of a tortfeasor's liability coverage are seldom known, much less disclosed,

Allstate in response to Ms. Carr's complaint. Casting convention to the winds, Allstate's answer (*see* Exhibit "2" hereto) - consisting of 14 affirmative defenses - as at once in conflict with the defendants' answer and the narrow mission of *Code*, 33-6-31(d).

Purporting to speak ". . . on behalf of the interests of the Defendants, Jamie Lynn Brooks and James E. Brooks," as well as Allstate, that answer averred, for example, a lack of knowledge and information sufficient to form a belief as to the truth or accuracy of all the allegations of Ms. Carr's complaint including, not incidentally, those quoted previously

prior to suit and formal discovery. Similarly, if several tortfeasors may be legally responsible for a plaintiff's injuries, that may affect such a determination. Questions of negligence and comparative negligence also may affect this calculus. For these reasons, and more, plaintiffs' lawyers - ever aware of the consequences of a failure to consider UIM coverage(s) - perforce routinely provide the statutory notice to the UIM carrier(s).

Quite properly, insurance defense firms - equally aware of the consequences of a substantial judgment, as well (if not least) the prosaic concerns which drive such practices - stand ready to file pleadings and take other allowable actions as may be directed to assuage the concerns of the UIM carrier.

with respect to the residency of the defendants and the ownership of the defendants' vehicle (*see* Allstate's "EIGHTH DEFENSE").

This "know nothing" response notwithstanding, Allstate's answer also asserted i) lack of jurisdiction over the subject matter ("THIRD DEFENSE"), ii) lack of jurisdiction over the person of the defendants ("FOURTH DEFENSE"), iii) improper venue ("FIFTH DEFENSE"), iv) insufficiency of process ("SIXTH DEFENSE"), and v) insufficiency of service of process ("SEVENTH DEFENSE").[6] Nor did this professed lack of knowledge or information deter Allstate from pleading the substantive defenses of comparative negligence, assumption of the risk, sudden emergency, the failure to mitigate damages, and lack of causation. Moreover,

[6]Allstate's answer asserting these dilatory defenses was served on 10 March 1993. This occurred despite the return of service - made by the official process server for Marshall County - showing that the defendants were personally served on 23 February 1993 (*see* Exhibit "3" hereto).

without so much as a genuflection to the reasoning that led to *Ara v. Erie Insurance Co., supra,* or the admonition contained in *Lusk v. Doe, supra,*[7] Allstate sought to repudiate Ms. Carr's coverage by claiming all policy defenses applicable to the underinsured motorist claim of its insured including, specifically, "untimely notice with prejudice[.]" ("FOURTEENTH DEFENSE").

Contending it was immune from Ms. Carr's discovery, Allstate failed to make any responses thereto. At the same time, however, it spared no fealty of effort in generating its own. Concurrent with the filing of its answer, Allstate served a "FIRST' set of interrogatories (approximately 120 in

[7]At note 4 in *Lusk v. Doe, supra*, the Court observed that an uninsured motorist carrier's attempt to bar a tort action by its insured against "John Doe" defendant via the assertion of contract defenses including, specifically, a failure to comply with the notice provisions of the statute, i) transgresses the protection against possible prejudice (from the mention of insurance) recognized in *Davis v. Robertson*, 175 W.Va 364, 332 S.E.2d 819 (1985), and ii) places the case under the "substantial interest" principles recognized in *Anderson v. McDonald*, 170 W.Va. 56, 289 S.E.2d 729 (1982).

number, including subparts), together with a "FIRST" set of document requests (approximately 26 in number, including subparts). This discovery sought many of the same medical records, bills and reports which were included as part of Exhibits "1" through "27" (consisting of 63 pages) to the requests to admit that also were served upon the defendants and Allstate with Ms. Carr's complaint.[8]

Not to be outdone - nor apparently content to rest upon Allstate's discovery - counsel selected by State Auto for the defendants followed in lemming-like fashion with a "FIRST" set of interrogatories (approximately 230 in number, including subparts) and a "FIRST" set of document requests (approximately 30 in number). Not surprisingly, these discovery efforts not only asked for many of the same medical records, bills and reports which were included as part of the

[8]Most, if not all, of these same medical records, bills and reports also had been in the possession of State Auto since late 1992 when it received the settlement demand it importuned.

foregoing requests to admit, but these efforts also subsumed most, if not all, of the same interrogatories and document requests that had been served upon Ms. Carr weeks earlier by Allstate.

Faced with two patently inconsistent answers on behalf of the defendants, as well as voluminous and duplicative discovery - not to mention the prospect of litigating this conventional negligence action against two adversaries (one contending for a status of anonymity) - Ms. Carr turned to the trial court for relief. On 11 June 1993, in response to the several motions filed prior thereto by Ms. Carr, the trial court:

> (1) granted Ms. Carr's motion to require a single answer on behalf of the defendants - the trial court finding that a "unified" defense was contemplated;

(2) granted Ms. Carr's motion to require Allstate to elect whether it would intervene in the name of the defendants, or in its own name - the trial court allowing Allstate to do one or the other, but not both;

(3) granted Ms. Carr's motion for a protective crder against Allstate, thereby relieving her of answering its discovery - the trial court finding that discovery shall not be duplicative;

(4) granted, in part, Ms. Carr's motion to strike certain of Allstate's defenses, *viz.*, lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, and insufficiency of process and service of process - the trial court finding that such defenses were **without**

merit and somewhat frivolous;

(5) denied Ms. Carr's motion for sanctions;

(6) denied the defendants' motion to bifurcate the issues of liability and damages; and

(7) reserved Allstate's right to revisit rulings (1) through (4) in the event contrary views were expressed in the decision to be issued upon the provisional rule granted by this Court in *State ex rel. State Auto Mutual Insurance Company v. Steptoe.*

(*See* Exhibit "4" hereto).

II.

THE ISSUE

The issue bequeathed to this Court for resolution is whether the right of intervention[9] accorded underinsurance

[9]According to the leading commentators, the rights afforded uninsurance/underinsurance carriers by statutes comparable to *Code*, 33-6-31(d) - *viz.*, to file pleadings and take other allowable action in the name of the owner, or operator, of the uninsured/underinsured vehicle, or both, or in its own name - are collectively known as "the right of intervention," or "the right to intervene." *See e.g.* 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* 28.14 (2d ed. 1987, Cum.Supp. 1992); 8C J. Appleman, *Insurance Law and Practice* 5089.55 (3d ed. 1980). Language similar, if not identical, to that contained in subsection (d) can be found in the statutes of most of the states that have developed UIM coverage. That said, this "right of intervention" is **not** to be confused with the procedure for intervention prescribed by Rule 24, *W.Va.R.Civ.P.* Interestingly enough, even where the applicant/movant seeks to become a party pursuant to subdivision (b) of Rule 24, intervention may be denied if the interest of the intervener is adequately represented by the original parties, or if the relief sought by the intervener might delay a decision on the merits. M. Lugar & L Silverstein, *West Virginia Rules* 205-206 (1960). In other contexts, moreover, this Court has held that even after intervention has been granted pursuant to statutory right, the rights of an intervener are not absolute. *See Halstead v. Dials*, 182 W.Va. 695, 391

carriers under *Code*, 33-6-31(d), is and should be limited in instances where, as here:

(1) the suit is not a direct (aka first-party/contract) action;

(2) the underinsurance carrier is not a party, much less a named defendant;

(3) the tortfeasor is not only insured for liability purposes, but also actively represented by counsel selected by that primary insurer;

(4) the question of the tortfeasor's

S.E.2d 385 (1990). Curiously too, it does not appear that the last sentence of subdivision (c) of this rule - requiring that the procedure for intervention set forth in the rule be followed when a statute of this State gives a right to intervene - has ever been construed since the adoption of the Rules of Civil Procedure.

liability is not only unresolved, but also vigorously contested;

(5) the question of the tortfeasor's "status" - *viz.*, whether the tortfeasor is "underinsured" - is not conceded by the underinsurance carrier and, therefore, unresolved;

(6) the underinsurance carrier has affirmatively contested coverage (thereby impliedly refusing to be bound by any judgment which may be entered); and

(7) the underinsurance carrier has not demonstrated that its interests are or will be prejudiced or inadequately protected by the named parties.

The issue is one of first impression. Appearing at first blush to be finite, it is not. Ancillary concerns abound. Additionally, insofar as our research discloses, the question has not bee reached in most of the 40 or so states that have developed some form of UIM coverage. Moreover, the leading commentators have not addressed the issue outside the uninsured motorist context. Unfortunately, as noted anon, the many decisions which have construed the statutory right of intervention in the uninsured motorist context are of little assistance in this type of underinsurance case.

There inheres in the ambition regime envisioned by Allstate the potential for the same conflicts that have shadowed the entirety of these procedures in the uninsured motorist setting.[10] If nothing else, the experience of these

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[10]These are not idle musings. For example, after analyzing the construction given to a similar statutory procedure for pursuing uninsured motorist claims in Georgia, even Professor Appleman was moved to remark ". . . what a 24 karat mess of garbage results in these situations[.]," noting further that Georgia was required to overrule several earlier decisions in clarifying the situation. 8C J. Appleman, *supra.*

cases teaches that such problems should be minimized, not

Georgia now holds that its statute allowing an uninsured motorist carrier to enter defenses in the name of the defendant does not give the insurer the right to control the litigation where, as here, contrary issues and intentions have been legally expressed through the pleadings filed by the defendant. *Londeau v. Davis*, 136 Ga.App. 25, 220 S.E.2d 43 (1975).

Similarly, as Professor Widiss has observed, *see* 2 A. Widiss, *supra*, 28.2, 28.3, the intervening insurer defends the uninsured motorist by attempting to prove either that the uninsured motorist was not negligent or that its insured (to whom it owes a duty of good faith and fair dealing) was negligent, or both. Troublesome enough, this situation often is exacerbated by the uninsured motorist's filing of a counterclaim. In this latter context, the insurer has both the contractual right and duty to defend the insured (usually even where such counterclaim is false, fraudulent or groundless). In discharging that duty, the insurer defends the insured by attempting to prove either that the uninsured motorist was negligent or that its insured (to whom it still owes a duty of good faith and fair dealing) was not negligent, or both. Obviously, the most advantageous result for the insurer is where both parties are found to be equally at fault. Nevertheless, as any schoolboy (legal) knows, these positions, and the interests of the insurer, are not only diametrically opposed, but also awash with conflicts. It is for these reasons, and more, that a number of courts, *inter alia*, have disqualified counsel in such situations, *see e.g. O'Bryan v. Leibson*, 446 S.W.2d 643 (Ky.App. 1969), confined the role of counsel for an intervening insurer, *see e.g. Curren v. Verinis*, 29 Conn.Supp. 79, 271 A.2d 703 (Conn.Super.Ct. 1970), otherwise restricted the right of intervention, *see e.g. Riley v. State Farm Mutual Automobile Ins. Co.*, 420 F.2d 1372 (6th Cir. 1990), or flat-out held that the uninsurance carrier cannot intervene or defend in such litigation, *see e.g. Criterion Ins. Co. v. Brown*, 469 S.W.2d 484 (Tex. 1971), *citing Allstate Ins. Co. v. Hunt*, 450 S.W.2d 668, *aff'd*, 469 S.W.2d 151 (Tex.App. 1970), the better-reasoned opinion of the intermediate appellate court. *See also* The Committee on Ethics and Professional Responsibility, (1) Informal Opinion 977, *Uninsured Motorist -Conflicting Interest of Insurance Company Attorney* (April 21, 1987), and (2) Informal Opinion 1065, *Representation of Uninsured Motorist by Lawyer Retained by Insurer of Other Motorist Involved in Accident* (July 21, 1969).

encouraged. Assuredly, any procedure which extends a full panoply of discovery and other rights to nonparties (e.g., the right to present and cross-examine witnesses) will not serve in the interests of judicial economy or justice. This is especially true in cases, ever more common today, involving two or more underinsurance carriers. In the issue-specific context of this type of underinsurance case, moreover, such difficulties are not only unnecessary, but clearly avoidable. Hence, it is respectfully urged that any decision to judicially modify our statute - at least in the type of underinsurance case presented here - be tempered with caution, circumspection and restraint.

III.

ARGUMENT

(A) The Familiar Rules

No analysis of the matters at issue should proceed without reprising those rules that currently serve to regulate underinsurance cases of the type posited here.[11]

Initially, it should be remembered that the preeminent public policy of our underinsured motorist statute is to provide full, ungrudging compensation to an injured insured for those damages that are not compensated by a negligent tortfeasor, at least to the extent of the UIM limits. Syl. pt. 5 (in part),

[11]To avoid needless repetition, any reference to "underinsurance cases" in this argument shall mean tort cases similar to the matter at hand, except where otherwise expressly indicated. Specifically, any such reference shall not mean the type of direct (aka first-party/contract) action recognized by *Postlethwait v. Boston Old Colony, supra*, and refined in *Plumley v. May*, ____ W.Va. ____, ____ S.E.2d ____ (slip op. 21614, July 22, 1993).

Pristavec v. Westfield Ins. Co., 184 W.Va. 331, 400 S.E.2d 575 (1990); *see also State Automobile Insurance Co. v. Youler, supra.* Nor can it be gainsaid that the development of UIM coverage represents a legislative recognition that the mandatory liability limits established by the mandatory financial responsibility laws, including the protection afforded by uninsured motorist coverage, were inadequate to compensate the innocent victims of the carnage on our highways. 2 A. Widiss, *supra*, 31.1; *see also* INSURANCE INFORMATION INSTITUTE, INSURANCE FACTS, 1987-88 PROPERTY/CASUALTY FACT BOOK 75 (1987). Furthermore, by holding that such coverage is activated when the amount of the tortfeasor's liability insurance available to the injured insured is less than the total amount of **damages** sustained by that person - regardless of any comparison between the limits of the available liability insurance and the UIM limits - this Court adopted what has been described as the "broad or excess coverage" view or definition of underinsured motorist

coverage.[12] *See generally* Comment, *Underinsured Motorist Coverage in Iowa*, 71 IOWA L. REV. 1569, 1575-76 (1986); *see also* 3 A. Widiss., *supra*, 35.2, 35.3.

It is equally important to recall that, as this Court emphasized in *Deel v. Sweeney*, 181 W.Va. 490, 383 S.E.2d 92 (1984), there are discrete and purposeful differences between uninsured and underinsured motorist coverages,[13] the selfsame statutory language prescribing the procedural rights of uninsurance and UIM carriers notwithstanding.[14] For instance, in the underinsurance case the tortfeasor is always insured against liability. For instance, in the underinsurance case the tortfeasor is always defended by

[12]Conversely, by upholding the validity of "consent-to-settle clauses as a valid and enforceable means by which an underinsurer may protect against the loss of its statutorily-mandated subrogation rights (as well as the risk of collusion), *Arndt v. Burdette*, _____ W.Va. _____, _____ S.E.2d _____ (slip op. 21457, July 22, 1993), it cannot be said that this Court has been insensitive to the concerns of underinsurance carriers. So too, *Deel v. Sweeney, supra*, in authorizing insurers to incorporate such optional terms, conditions and exclusions into the underinsurance provisions of an automobile policy as may be consistent with both the intent of the statute and the premium charged including, for example: (1) an exclusion which prohibits the stacking of underinsurance coverage when more than one vehicle is insured under a single policy at rates reflecting a multi-car discount, *Arbogast v. Nationwide Mutual Insurance Co.*, _____ W.Va. _____, 427 S.E.2d 461 (1993), *see also Russeg v. State Auto. Mut. Ins. Co.*, 188 W.Va. 81, 422 S.E.2d 803 (1992); (2) a "family use exclusion" which exempts from the definition of an underinsured vehicle "any automobile owned by or furnished for the regular use of the insured or a relative," *Thomas v. Nationwide Mutual Insurance Co.*, _____ W.Va. _____, 425 S.E.2d 595 (1992), *see also Alexander v. State Automobile Mutual Insurance Co.*, 187 W.Va. 72, 415 S.E.2d 618 (1992); and (3) provisions creating two distinct classes of covered individuals, the second thereof i) tying a permissive user's right to UIM benefits to the occupancy of a covered vehicle, and ii) limiting the recovery of such benefits to only those prescribed by the policy on the occupied vehicle involved in the accident (thereby precluding the "stacking" of the named insured's UIM coverage on another vehicle), *Starr v. State Farm Fire and Cas. Co.*, _____ W.Va. _____, 423 S.E.2d 922 (1992).

[13]These significant differences demonstrate why the many reported decisions construing this statutory right of intervention in the uninsured motorist context are of little value here.

[14]Although no criticism is here intended, it seems clear that, by simply amending the extant statutory language to integrate UIM carriers, little analysis was given as to whether the significant differences in these coverages called for a refinement of the procedural requirements imposed by subsection (d). As *Deel* makes plain, however, the Legislature does not view uninsured and underinsured motorist coverage in the same light. For example, not only was subsection (b) of the statute amended in 1982 to require an insurer to provide optional underinsured motorist coverage, but that amendment also was made by separate provision. Contrary to the statutes in a number of states (and the insurance policies issued pursuant thereto), therefore, underinsurance motorist coverage is not "included" within uninsured motorist coverage. Rather, it is a separate entity or separate program. One does not include the other, the language of subsection (d) notwithstanding.

counsel, indeed counsel hand-picked by the tortfeasor's liability insurer. For instance, in the underinsurance case the question of whether the tortfeasor is "underinsured" - *viz.*, the "fact" or "status" of being underinsured - is always unresolved. For instance, in the underinsurance case the interests of the tortfeasor and the tortfeasor's liability insurer are always congruent.[15] For instance, in the underinsurance case *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 396 S.E.2d 766 (1990), aka *Shamblin II*, is always sufficient incentive to keep

[15]In the underinsurance case: (a) the tortfeasor owes the tortfeasor's liability insurer a contractual duty of cooperation and full disclosure; (b) the tortfeasor's liability insurer owes the tortfeasor the contractual duty of a defense and coverage; (c) the tortfeasor's liability insurer owes the tortfeasor a duty of good faith and fair dealing; and (by extension) (d) the tortfeasor and tortfeasor's liability insurer each agree that neither will do anything to deprive the other of the benefits of the insurance contract. *See eg. Shamblin v. Nationwide Mutual Insurance Co., supra; Berry v. Nationwide Mutual Fire Insurance Co.*, 181 W.Va. 168, 381 S.E.2d 367 (1989); *Aetna Casualty and Surety Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986); *see generally Smith v. Buege*, 182 W.Va. 204, 387 S.E.2d 109 (1989); *Robinson v. Fidelity & Deposit Co.*, 181 W.Va. 463, 383 S.E.2d 95 (1989).

a verdict within the limits of the tortfeasor's policy. In sum, the policy considerations that militate in favor of a more ambitious role for the insurer upon intervention in uninsured motorist cases - not to mention the direct action suits authorized by *Postlethwait v. Boston Old Colony, supra,* and refined in *Plumley v. May, supra* - do **not** obtain here.

Even more fundamentally, it should be remembered here that the underinsurance carrier, Allstate, is a stranger to the defendants. No privity exists between them. Allstate has no contract with Miss Brooks, or her father, and neither of them owes Allstate any duty of cooperation or disclosure. Nor do the defendants enjoy any advantage from Allstate's UIM coverage. To the contrary, as *Arndt v. Burdette, supra,* demonstrates, Miss Brooks, if no her father, is amenable to Allstate's statutorily-mandated subrogation rights.[16]

[16]The preservation of these subrogation rights in *Arndt v. Burdette, supra*, further reinforces the need to limit the underinsurance carrier to a passive role in an underinsurance case. One need not be an ethicist to

To reiterate, this is **not** a *Postlethwait*-directed suit. Allstate is **not** a party-defendant, indeed cannot be made a party-defendant. In this underinsurance case, Allstate has neither the contractual right nor duty to defend Miss Brooks and her father. Conversely, neither Miss Brooks nor her father - contractants of State Auto - can grant, cede or barter the defense to Allstate. Not unlike those cases wherein a tortfeasor's primary and excess coverages are both implicated, it is the primary carrier that has the right and duty to control the tortfeasor's defense.[17] The excess carrier follows the fortunes of the primary and may not interfere therein, any

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have concerns about any procedure that would authorize Allstate, for example, i) to actively defend Miss Brooks against a claim of negligence by its insured but, if unsuccessful, ii) to file a subrogation claim against Miss Brooks grounded upon the same claim of negligence.

[17]These concepts are not foreign to this Court. In *Allstate Ins. Co. v. State Auto Mut. Ins. Co.*, 178 W.Va. 704, 364 S.E.2d 30 (1987), a suit arising out of an automobile collision wherein the automobile liability policies of both the driver and the owner of the offending automobile each contained a pro-rata clause and an excess clause, the Court held the insurer of the owner was primarily liable - "that the simple, bright-line rule of law is that the primary obligation to defend and indemnify follows the automobile, rather than the driver" - and therefore, that the owner's insurer must bear the whole loss (including the defense costs), up to the limits of the policy.

provisions in its policy with the tortfeasor to the contrary notwithstanding. On the other hand, the excess carrier has the right to expect, and enforce, the duty of good faith and fair dealing owed it by the primary carrier, especially in instances where the primary carrier unreasonably rejects a settlement offer within its policy limits. *See e.g. Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 62 Ohio St.2d 221, 404 N.E.2d 759 (1980) (the great weight of authority is now that the insurer's duty is to act in good faith with respect to excess carriers).[18]

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[18]The soundness of this rule was confirmed in *Continental Cas. Co. v. United States Fidelity & Guar. Co.*, 516 F.Supp. 384 (N.D. Cal. 1981), where the claims manager, upon learning of excess coverage, ceased attempts to settle on the mistaken belief that the primary insurer owed no duty of good faith to the excess carrier.

In the underinsurance case, to be sure, the lack of privity between the plaintiff-insured and the tortfeasor's liability insurer prescinds the creation of a duty of good faith running from the tortfeasor's carrier to the underinsurance carrier. Nevertheless, in instances where the tortfeasor's liability insurer unreasonably rejects a settlement offer within its limits, nothing would appear to prevent this Court from vesting the underinsurance carrier with a right of "equitable subrogation," *see Vencill v. Continental Casualty Co.*, 434 F.Supp. 1371, 1376 (S.D. W.Va. 1977), against the tortfeasor's liability carrier in the event of a judgment in excess of the
latter's limits. In short, upon payment of the excess portion of the judgment in such instances, the underinsurance carrier succeeds to the bad faith claim that was established for its insured against the tortfeasor's liability insurer by *Shamblin v. Nationwide Mutual Insurance Co., supra.*

Interestingly enough, Allstate admits it is **not** a party, and that the provisions of *Code*, 33-6-31(d), do **not** make it a party. Additionally, Allstate concedes it has no interest in protecting Miss Brooks and her father against liability - that it's only interest is in keeping the verdict sufficiently low to avoid the invasion of the UIM coverage. Indeed, so far as Miss Brooks and her father are concerned, Allstate is a nonparty volunteer, if not an interloper, solely concerned with its own interests.

Indeed, fidelity to *Shamblin II*, if not *Arndt v. Burdette, supra*, would appear to intuit such a result. Moreover, a number of courts have upheld judgments in favor of excess carriers against primary carriers by holding that if the insured (or someone suing in the place of the insured, e.g., the excess carrier) proves that the primary insurer breached its duty to settle within its policy limits, the law presumes that the third party (plaintiff) would have agreed to settle the case within the policy limits. *See e.g. Pacific Employers Insurance Co.*, 796 F.Supp. 1428 (D. Kan. 1992); *Covill v. Phillips*, 452 F.Supp. 224 (D. Kan. 1978); *Coleman v. Holecek*, 542 F.2d 532 (10th Cir. 1976); *Young v. American Casualty Co. of Reading, Pa.*, 416 F.2d 906 (2d Cir. 1969), *cert. dismissed*, 396 U.S. 997 (1970).

But control over the litigation by the underinsurance carrier should not be so easily won. The "consent-to-settle" clause serves as a shield, not a sword. The underinsurance carrier must not be permitted to unreasonably withhold its consent to settle; nor "force" a trial between the plaintiff and the defendant; nor force the average tortfeasor into personal bankruptcy to evade subrogation.

On the other hand, Allstate is no stranger to Ms. Carr. Setting aside momentarily any issue of coverage, Ms. Carr is an Allstate insured. Having paid the premiums (via her son), Ms. Carr may reasonably expect the benefits of the policy. Allstate owes Ms. Carr a duty of good faith and fair dealing. At minimum, this duty requires Allstate to accord the interests and rights of Ms. Carr at least as great a respect as its own. *Shamblin v. Nationwide Mutual Insurance Co., supra.*

(B) The Statute Giveth And Taketh Away

To be sure, as Allstate insists and *Postlethwait* confirms, *Code*, 33-6-31(d), provides the underinsurance carrier with several solicitudes. As said previously, *ante* at note 9, the carrier is permitted to file pleadings and take other allowable action in the name of the owner and/or operator of the underinsured vehicle ". . . **or** in its own name." (Accent added). Nevertheless, if the operative word "or" is used in its

normal disjunctive sense, it seems clear that, contrary to the position taken by Allstate, the underinsurance carrier may do one or the other, but **not** both.

In all fairness and events, however, it must be admitted that statutory construction "is a holistic exercise," *United States Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371, 108 S.Ct. 626, 632, 98 L.Ed.2d 371, 377 (1988), and, at a minimum, must account for a statute's full text and language, its object and policy. Hence, while contending for an interpretation that would establish rights well outside a literal reading of the statute, it is interesting to note that Allstate studiedly ignores the final paragraph of *Code*, 33-6-31(d). It provides:

> "Nothing in this subsection shall prevent such owner or operator from employing counsel of his own choice and taking any action in his own interest in connection with such proceeding."

(Accent added).

There can be little question that constitutional considerations - always in the wings if not on stage when notice and other procedural rights are competing for attention - intuited this provision. *See eg. Perkins v. Doe*, 177 W.Va. 84, 350 S.E.2d 711 (1986); *Lusk v. Doe, supra.* In this instance, the due process rights of the tortfeasor, if not his or her liability insurer, are the cynosure of this final paragraph. When these same rights are summoned to the protection of the tortfeasor, however, the antecedent procedural provisions of subsection (d) appear considerably attenuated.

The statutory notice, for example, is simply that, a notice. It is intended to be served (by such procedural means) as if the underinsurer were a party, rather than through the mail with no clear proof that it was sent or received.

Similarly, the other procedural protections accorded Allstate are not the equivalent of the rights reserved for party-litigants in a tort case. If it were otherwise, the final paragraph of subsection (d) would be emptied of meaning. In short, any such interpretation would operate in derogation of the tortfeasor's rights - constitutional, contractual, statutory or otherwise (acting by and through the tortfeasor's liability insurer) - by preventing the tortfeasor from **"employing counsel . . . of his own choice and taking any action in his own interest in connection with such proceeding."** (Accent added).

(C) The Fear Of Collusion

Allstate's professed concern for collusion suffers from several flaws, both factual and conceptual.

First of all, despite Allstate's insinuations about the

possibility of collusion, or less than arm's length relationship, between its insured (Ms. Carr) and the defendants, there is not a shred of evidence to support such a relationship. To the contrary, the affirmative defenses and the discovery efforts made by counsel selected for the defendants by State Auto, if not the failure of State Auto to extend any settlement offer, belies any such bogeyman argument. This is **not** an inter-family suit, *see Lee v. Comer*, 159 W.Va. 585, 224 S.E.2d 721 (1976), with the unique problems ofttimes seen there. Nevertheless, even there, as the Court observed in *Coffindaffer v. Coffindaffer*, 161 W.Va. 557, 562, 244 S.E.2d 338, 343 (1978):

> "Anyone who has confronted insurance defense counsel in personal injury cases knows that it is a rare occasion when the false or collusive claim escapes their searching examination. We do an injustice not only to the intelligence of jurors, but to the efficacy of the adversary system, when we express undue concern over the quantum of collusive or meritless law suits. There is, to be sure, a difference between the ability to file a suit and

> to achieve a successful result. It is upon the anvil of litigation that the merit of a case is finally determined. Forged in the heat of trial, few but the meritorious survive."

It follows that, in the underinsurance case, it is the tortfeasor's liability insurer that must be most concerned about the threat of collusion. This is especially true where, as here, the tortfeasor's liability limits are substantially higher than the UIM limits (*viz.*, $250,000.00 vs. $25,000.00). Nevertheless, no such concerns have been registered here by State Auto, nor can it be supposed that any such concerns have evaded its attention.

Secondly, it is common ground that any verdict obtained by fraud or collusion is not conclusive and may be avoided. Nevertheless, it is equally clear that, under the guise of defending an underinsured motorist claim, an underinsurer carrier may not engage in a "fishing expedition," or other tactics, to find collateral grounds to defeat the claim of its

insured to whom it owes a duty of good faith and fair dealing. Contrary to Allstate's assertion - as the admonition of *Lusk v. Doe., supra*, illustrates (*ante* at note 7) - the defense of the underinsured motorist cannot be augmented by the assertion of contract or policy defenses, the latter being irrelevant to the insured's burden of proof in a tort action against a delinquent motorist. On the other hand, if there actually are collusion problems or bona fide policy defenses, nothing prevents the underinsurance carrier from engaging separate counsel to protect its procedural due process rights by filing a declaratory judgment action. Such an action affords a complete opportunity for the underinsurance carrier to discover evidence of such bases for avoiding coverage, not excluding deposing the tortfeasor in respect to collusion, etc. Importantly, not only does the underinsurance carrier have the right to seek such declaratory relief in the same action, *see Christian v. Sizemore*, 181 W.Va. 628, 383 S.E.2d 810 (1989), aka *Sizemore I*, but fidelity to the teachings of *Sizemore I* also

anticipates that issues implicating coverage will be resolved before the underlying tort case is tried on the merits. *See also Liberty Mut. Ins. Co. v. Triangle Industries*, 182 W.Va. 580, 390 S.E.2d 562 (1990); *Anderson v. Robinson*, 186 W.Va. 92, 411 S.E.2d 35 (1991); *Buckhannon-Upshur Cty. Airport v. R & R Coal*, 186 W.Va. 583, 413 S.E.2d 404 (1991); *Bowyer by Bowyer v. Thomas*, ____ W.Va. ____, 423 S.E.2d 906 (1992). Even more importantly, Allstate knows this. *See Plumley v. May, supra.*

Independent of the reasoning that inspired *Ara v. Erie Insurance Co., supra*, and the admonition contained in *Lusk v. Doe, supra*, several uninsured motorist cases have denied intervention where the insurer would not concede it would be obligated to pay any judgment obtained against the uninsured motorist, to the extent of the coverage limits, and no coverage questions were implicated. *See e.g. Allstate Ins. Co. v. Hunt, supra; Barry v. Keith*, 474 S.W.2d 876 (Ky. 1971); *United Servs. Auto. Ass'n v. Logue*, 117 Ga.App. 717, 162 S.E.2d 12

(1968); *Continental Ins. Co. v. Smith*, 115 Ga.App. 667, 155 S.E.2d 713 (1967); *State Farm Mutual Automobile Insurance Co. v. Glover*, 113 Ga.App. 815, 149 S.E.2d 852 (1966);[19] *contra: Doe v. Moss*, 120 Ga.App. 762, 172 S.E.2d 321 (1969).

Additionally, the "consent-to-settle" clause serves to protect the underinsurance carrier against the risk of collusion. *See Lambert v. State Farm Mut. Auto. Ins. Co.*, 576 So.2d 160, 164 (Ala. 1991). Perhaps more importantly, by holding (1) that the "consent-to-settle" clause is a valid and enforceable means to protect the underinsurer against the loss of its statutorily-mandated subrogation rights, *Arndt v. Burdette, supra*, and (2) that UIM coverage is predicated on

[19]Parenthetically, it is submitted that the rationale for these decisions appears to be akin to that undergirding *W. Va. Code*, 33-6-21 [1957], and *W. Va. Code*, 17D-4-12(1) [1979], each of which i) fix the insurer's liability at the time of injury, and ii) prevent any retroactive annulment of coverage by virtue of any agreement between the insurer and the insured, or any statement by or on behalf of the insured.

an insured's damages exceeding the amount of indemnification actually available from the tortfeasor's liability insurance, *Pristavec v. Westfield Ins. Co., supra.*, this Court implicitly, if not expressly, recognized the validity of the "exhaustion" clause commonly seen in the standard forms for UIM coverage.[20] This exhaustion requirement, therefore, not only minimizes the risk of collusion, but it also discourages, if not prevents, an insured from obtaining a "below-the-coverage-available settlement" from the tortfeasor's liability insurer and then seeking to recoup the "gap" between that settlement and the insured's damages from the underinsurance carrier. Even more importantly, Allstate knows this. *See Arndt v. Burdette, supra.*

Last, but not least important, this alleged fear of

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[20]The standard forms for UIM coverage provide that the insurer will pay UIM benefits only "after the limits of liability under any applicable bodily injury bonds or policies have been exhausted by payments of judgments or settlements." INSURANCE SERVICES OFFICE PERSONAL AUTO POLICY PORTFOLIO: Underinsured Motorist Insurance Form pp. 03 11 (ed. 6-80).

collusion was squarely confronted in *Erie Indemnity Co. v. Kerns*, 179 W.Va. 305, 367 S.E.2d 774 (1988), a certified-question case arising from a suit by an injured owner-passenger against her daughter, the negligent driver of the vehicle covered under the terms of the mother's policy. (There), Erie asserted that the plaintiff and her daughter were in collusion because they were not true adverse parties and, therefore, the suit violated public policy. Although recognizing that in a suit between a child and a parent the insurance company can expect only minimal cooperation from the insured, the Court held, in the second syllabus point, as follows:

> "2. When an insurance carrier is the real party in interest and it has reasonable grounds to believe that there is collusion between its insured and the plaintiff in a civil action, the carrier may elect to request the court to advise the jury that the plaintiff and defendant share a community of interest and that the insurance company is the real party in interest on the defendant's side."

(Accent added). *See also Lee v. Comer, supra* (Neely, J., concurring), 224 S.E.2d at 726. Obviously, if the threat of collusion here is real and not theoretical, nothing prevents Allstate from invoking this bright-line standard.

(D) Views From Other Venues

Not only does there appear to be a paucity of authority on the issue presented here, but considerable care must be exercised in evaluating those few reported cases which do exist. This caveat adheres for various reasons, not least because of the differences in the statutes and rules that regulate the right of intervention in underinsurance cases.

So, for example, in *Husfeldt v. Willmsen*, 434 N.W.2d 480 (Minn.App. 1989), Farm Bureau Mutual Insurance Company ("Farm Bureau"), the plaintiff's underinsurance

carrier, filed a motion to intervene as a party-defendant in a suit by its insured against a putative underinsured tortfeasor. Farm Bureau's motion, made pursuant to the Minnesota counterpart to Rule 24, *W.Va.R.Civ.P.*, alleged that its rights would be jeopardized if it was not permitted to intervene, inasmuch as it might be bound by any judgment in excess of the limits of liability provided by the defendant-tortfeasor's policy with State Farm. No suggestion was made by Farm Bureau, however, that the tortfeasor and State Farm would not vigorously defend the action from both a liability and damage standpoint. Finding that no showing had been made that Farm Bureau's asserted interest in limiting its potential underinsurance liability would not be adequately represented by the tortfeasor (via State Farm, the defendant's liability insurer), the Court held that the trial court had not erred in finding intervention inappropriate in the circumstances.

In *Haas v. Freeman*, 236 Kan. 677, 693 P.2d 1199

(1985), the Kansas Supreme Court established the procedure an insured must employ to bring a claim for UIM benefits under the Kansas statute which limits recovery to the amount of **damages** that exceeds the tortfeasor's liability policy limits. In doing so, the Court recognized some of the distinct differences that exist between uninsured and underinsured motorist claims, e.g.: (1) that, unlike the uninsured action, the opposing tortfeasor and his insurance carrier are actively involved in the underinsured motorist action; (2) that the fact of underinsurance is an unresolved issue; and (3) that the joinder of the underinsurance carrier would confuse the jury and overemphasize the insurance feature of the lawsuit. Hence, held the Court: the underinsured must notify his insurer of an intent to invoke the underinsured motorist clause of his policy in the manner prescribed by the insurance policy; then, unlike an uninsured motorist claim, the insurer has the option to elect to intervene in the case and become a named party or, in the alternative, opt not to intervene, in which case

no evidence of insurance would be allowed in the tort action; under either option, the underinsurance carrier is bound by the judgment obtained. *See also Ramsey v. Chism*, 249 Kan. 299, 817 P.2d 198 (1991) (accord).

IV.

CONCLUSION

It is not idle to ring-in the metaphor, "if it's not broke, don't fix it," in these circumstances. By confining the plaintiff's insurer to a passive role in underinsurance cases - subject to enlargement by the trial court upon a showing that its interests are not being adequately protected - the conflicts portended will be minimized, if not eliminated. To that end, the action of the trial court *sub judice* should be affirmed.

Respectfully submitted this 7th day of September, 1993.

NORMA J. CARR,
PLAINTIFF-BELOW

by /s/ G. Charles Hughes

G. Charles Hughes
G. Charles Hughes, L.C.
Seventh at Court Avenue
Moundsville, WV 26041

Robert P. Fitsimmons, Esq.
Fitzsimmons & Associates
2003 Warwood Avenue
Wheeling, WV 26003

Counsel for the Plaintiff

CERTIFICATE OF SERVICE

Service of the foregoing PLAINTIFF'S MEMO IN OPPOSITION TO PROVISIONAL RULE was had upon the parties herein by depositing true copies thereof in the United States mail, postage prepaid, addressed as follows, to-wit:

Walter M. Jones, III, Esq.
Martin & Seibert, L.C.
119 S. College Street
P.O. Box 1286
Martinsburg, WV 25401

Counsel for the Petitioner

Larry W. Blalock, Esq.
Jackson & Kelly
256 Russel Avenue
P.O. Drawer 68
New Martinsville, WV 26155

Counsel for Respondents, Jamie Lynn Brooks and James E. Brooks

this 7th day of September, 1993

/s/ G. Charles Hughes
Of Counsel for the Plaintiff

APPENDIX, TAB "I"

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

NORMA J. CARR,

Plaintiff,

vs.

CIVIL ACTION NO.
93-C-72K

JAMIE LYNN BROOKS and
JAMES E. BROOKS,

Defendants.

CONSOLIDATED OPPOSITION OF ALLSTATE INSURANCE COMPANY TO PLAINTIFF'S MOTION FOR SINGLE ANSWER, MOTION FOR ALLSTATE INSURANCE COMPANY TO MAKE AN ELECTION PURSUANT TO W. VA. CODE § 33-6-11, MOTION FOR PROTECTIVE ORDER AND MOTION TO STRIKE VARIOUS AFFIRMATIVE DEFENSES AND FOR SANCTIONS

Comes now the Notice-Defendant Allstate Insurance Company, by counsel, Martin & Seibert, L.C., and opposes the related Motions filed by the Plaintiff (1) for a single answer; (2) for this Notice-Defendant to make an election; (3) for protective order; and (4) to dismiss various affirmative defenses interposed by this Notice-Defendant and for sanctions, on the grounds and for the reasons set forth in the accompanying Memorandum of Points & Authorities.

ALLSTATE INSURANCE COMPANY
BY COUNSEL

MARTIN & SEIBERT, L.C.

BY: /s/ Walter M. Jones, III
Walter M. Jones, III
119 S. College Street
P.O. Box 1286
Martinsburg, WV 25401
(304) 267-8985

CERTIFICATE OF SERVICE

I, Walter M. Jones, III, Counsel for the Defendant, Allstate Insurnace Company, hereby certify that I served a true copy of the foregoing **Consolidated Opposition of Allstate Insurance Company to Plaintiff's Motion for Single Answer, Motion for Allstate Insurance Company to Make an Election Pursuant to W.Va. Code § 33-6-1, Motion for Protective Order and Motion to Strike Various Affirmative Defenses and for Sanctions** upon the following individuals by placing the same in the U.S. Mail, First Class, postage prepaid, on this the *30th* day of April, 1993:

G. Charles Hughes
G. Charles Hughes, L.C.
P.O. Box 871
Moundsville, WV 26041

Robert P. Fitzsimmons
Fitzsimmons & Parsons, L.C.
2003 Warwood Avenue
Wheeling, WV 26003

Donald M. Kresen
Jackson & Kelly
P.O. Drawer 68
New Martinsville, WV 26515

/s/ Walter M. Jones, III
Walter M. Jones, III

2

IN THE CIRCUIT COURT OF
MARSHALL COUNTY, WEST VIRGINIA

NORMA J. CARR,

Plaintiff,

vs. **CIVIL ACTION NO. 93-C-72K**

JAMIE LYNN BROOKS and JAMES E. BROOKS,

Defendants.

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF CONSOLIDATED OPPOSITION OF ALLSTATE INSURANCE COMPANY TO PLAINTIFF'S MOTION FOR SINGLE ANSWER, MOTION FOR ALLSTATE INSURANCE COMPANY TO MAKE AN ELECTION PURSUANT TO W. VA. CODE § 33-6-11, MOTION FOR PROTECTIVE ORDER AND MOTION TO STRIKE VARIOUS AFFIRMATIVE DEFENSES AND FOR SANCTIONS

This case arises from an automobile collision, at which time the Plaintiff was insured by this Notice-Defendant pursuant to an uninsured/underinsured ("UM/UIM") motorist endorsement to her policy of automobile liability insurance. Service of process was made upon this Noice-Defendant pursuant to W. Va. Code § 33-6-11(d) which provides that a UM/UIM insurnace carrier must, if a plaintiff seeks to avail himself of such coverage, be served with process "*as though* such insurance company were a named party defendant." *Id.* Thus, while not a true party defendant to the present action, this Notice-Defendant is statutorily permitted to participate in it in order to protect its interests. Because the Plaintiff has elected to simultaneously file four interrelated Motions which

impact upon this Notice-Defendant's participation in the present action and which reflect a single effort to restrain that participation, this Notice-Defendant takes

the unusual step of responding to them in consolidated fashion in the belief that such a response will assist the Court by cohesively addresing the issues raised therein.

I. MOTION FOR SINGLE ANSWER.

Plaintiff, in an excercise of pure legal reasoning, untainted by citation to the precedents (*a fortiori*, any case, statute, rule or principle of law whatsoever), urges this Court that, becuse this Notice-Defendant has filed an Answer in the instant action invoking defenses which may be available to the true Defendants, the alleged tortfeasors herein, that the true defendants be prohibited from appearing and defending by filing their Answers to Plaintiff's Complaint. The rights of the parties are unequivocally spelled out in Code § 33-6-11(d) which clearly indicates that Plaintiff's inability to cite legal authority in support of her position is because her position is directly contrary to the black letter of the law.

As regards this Notice-Defendant's right to file an Answer invoking the rights of the alleged underinsured motorist, "such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name." *Id.* The rights of the alleged tortfeasors to file Answers are, likewise, clearly defined in the statute. "*Nothing in this subsection shall prevent* such owner or operator from . . . taking any action in his own interest in connection with such proceeding." *Id.* (emphasis added). Thus, it is explicitly permitted in an action such as this that both the insurance carrier and the true defendant may file separate Answers.

By suggesting that only the insurance carrier - **or** - the alleged tortfeasor defendant may file an Answer, the Plaintiff urges this Court to do nothing less than engraft a condition upon this right which the legislature elected not to impose in its enactment of § 33-6-31. Nothing in the language of this Section asserts or implies that the right of either the underinsured motorist carrier or the alleged tortfeasor defendant to file an Answer is contigent upon the failure of the other to do so. Likewise, nothing in § 33-6-31 states, suggests or implies that the carrier and the alleged tortfeasor defendant must assert the same defenses or assert consistent defenses for the convenience of the Plaintiff, or, to put it conversely, that they may be precluded by the Court from asserting inconsistent defenses, as the Plaitniff argues here. *See Alsbach v. Bader*, 616 S.W.2d 147 (Mo. App. 1981). Thus, the true import of Plaintiff's argument is that this Court take the unprincipled step of legislating terms and conditions upon the rights set forth in § 33-6-31 which the elected representatives of the people of this State have chose not to impose.

Even if the language of § 33-6-31 were unclear as to the rigths of the parties, the position espoused by the Plaintiff is legally illogical and cannot be viewed as reflective of the legislative intent underlying this Section. Clearly, due process requires that, if the judgment of this Court in the action between Plaintiff and the alleged tortfeasor defendant is to be binding at all upon this Notice-Defenant as well as the alleged tortfeasor defendant, both the alleged tortfeasor defendant and this Notice-Defendant must be afforded notice and opportunity to be heard. *Powell v. Alabama*, 287 U.S. 45 (1932). Moreover, the opportunity to be heard must be meaningful in

nature and each defendant or Notice-Defendant must have the opportunity to present its own defenses to the Plaintiff's claim. *Holt v. Virginia*, 381 U.S. 131 (1965).

In the context of uninsured or underinsured motorist litigation, it cannot be assumed that the plaintiff and the alleged tortfeasor defendant are, in fact, adverse to each other or that, even if adversity exists, the tortfeasor defendant will have the same motivation to defend that the uninsured or underinsured motorist carrier, which eventually may be required to satisfy the judgment, will have. Many such claims occur where one family member who was a passenger in a vehicle sues another family member who was the operator. Others occur between friends and acquaintances. A third vein of such claims arises from the actions of persons who are simply irresponsible in carrying no insurance or too little insurance.

As between friends and family members, the possibility of collusion arises as does the likelihood that the alleged tortfeasor defendant may be disinclined to mount a vigorous defense, either of which would impair the rights of the uninsured or underinsured motorist carrier whose defense, by the Plaintiff's reasoning, would be tied to that of the alleged tortfeasor defendant. Where defendants of demonstrated irresponsibility are concerned, the possibility of disinterested or indifferent defense arises which would similarly prejudice the rights of the uninsured or underinsured motorist carrier. Even where the adversaries are strangers and are motivated to vigorously litigate their differences, the interests of the alleged tortfeasor defendant are not so inextricably intertwined with those of the uninsured or underinsured motorist carrier that it can be said that defense of one is defense of the other.[1]

Clearly, then, holding the alleged tortfeasor defendant and the uninsured or underinsured motorist carrier to a single unified defense as the Plaintiff here urges is, by definition, a denial

[1]Bear in mind that, in the event of an award which the insurer satisfies, the insurer is then subrogated to the rights of the insured plaintiff against the alleged tortfeasor defendant. Thus, any alliance of interests between the alleged tortfeasor defendant and the uninsured or underinsured motorist carrier is fleeting, if not altogether illusory.

of the due process right of one or the other or both to put forth the defenses which best serve its own individual interests. It necessarily follows that it could not have been the intention of the legislature in enacting § 33-6-31 to implement a procedure which is constitutionally offensive and Plaintiff's interpretation of this Section is necessarily erroneous. The only interpretation of this statute which is consistent with the due process clause of the fourteenth amendment to the United States Constitution is, as is clearly set forth in the black letter of § 33-6-31, that all defendants and notice-defendants who may be bound by the judgment be afforded the opportunity to defend as their individual interests may require and without regard to the interests of other parties. It necessarily follows that both this Notice-Defendant and the alleged tortfeasor defendant each must be entitled to answer the Plaintiff's Complaint as their individual interests appear to them and to assert those defenses which they believe will advance those interests. Plaintiff's motion must, therefore, be denied. Further, it is clear by the mere reading of Allstate's Answer that defenses which are affirmative in nature are reserved to protect the interests of Allstate without prejudicing the tortfeasor by waiver. Since the interests of Allstate and the tortfeasor are adverse, in the absence of a consent to settle, Allstate as the underinsured carrier has the statutory right to preserve defenses which may be waived if not asserted or reserved.

II. MOTION FOR ALLSTATE INSURANCE COMPANY TO MAKE AN ELECTION PURSUANT TO W. VA. CODE § 33-6-31(d).

Here, again, Plaintiff requests that this Court engraft upon Code § 33-6-31 a limitation which does not exist and

offers not a shred of authority in support of her position. Plaintiff's assertion that it is unclear from the Answer filed by this Notice-Defendant whether it is

appearing in its own name or on behalf of the tortfeasor defendant misconstrues the operative language of § 33-6-31(d) that "such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured motor vehicle or in its own name." Obviously, Plaintiff is unable to read the pleading which states, "Comes now Allstate Insurance Company . . . and as its Answer to the Plaintiff's Complaint, pursuant to West Virginia §33-6-31, and on behalf of the interests of the Defendants . . ." (emphasis added)

Looking first to the black letter of the statute, there is absolutely nothing in this statute which requires that this Notice-Defendant *appear* in its own name or in that of the alleged tortfeasor defendant.[2] Rather, the statute speaks of the uninsured or underinsured motorist carrier having the right to *file papers* and *take actions* in its own name or that of the alleged tortfeasor defendant. The clear import of this language is to empower the uninsured or underinsured motorist carrier to raise defenses which it might have to the Plaintiff's action and to raise those defenses which the alleged tortfeasor defendant might have. There is nothing in the language of it which requires the uninsured or underinsured motorist carrier to act only in its own name or that of the alleged tortfeasor defendant nor is there any language which prohibits it from filing some papers and taking some actions in its own name while filing other papers and taking other actions in the name of the alleged tortfeasor defendant. Nor is there any language whatsoever in this statute which implies

or suggests that a notice-defendant be required to make an election or otherwise limit its participation in the action as Plaintiff suggests and

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[2]*A fortiori*, the term "appear" or any of its synonyms does not appear in § 33-6-31(d).

there is not a single iota of legal authority in the jurisprudence of this State which supports such a premise.

Plaintiff's inability to glean the capacity in which this Notice-Defendant appears in the present action is directly proportional to and reflective of Plaintiff's inability or self-serving unwillingness to comprehend § 33-6-31. Whatever the remedy for this shortcoming may be, it is not for this Court to assume the role of a super-legislature, as the Plaintiff would have it do, and thereafter re-write this statute to the Plaintiff's liking (and advantage).

As if this were not enough in and of itself, the Plaintiff next suggests that an election is required of this Notice-Defendant to also inform us as to the effect of such an election. We cynically doubt her when she asserts that (1) such an election would be unalterable and irrevocable; (2) only such an election would permit this Notice-Defendant to participate in discovery; and (3) such an election would open this Notice-Defendant to discovery by the Plaintiff. "By what authority?," Plaintiff fails to comprehend either the import of the relationship of underinsured motorist carrier to tortfeasor's, or the practical considerations applicable to such relationship. Clearly, until an underinsured motorist carrier consents to a settlement by the liability carrier and waive its rights of subrogation, the interests of the underinsured motorist carrier and the tortfeasor are adverse and the duty to defend rests with the liability carriers. This does not mean that the underinsured motorist carrier need to participate in the action for purposes of evaluation, defense, settlement, consent to settle or trial. Until consent to settle is given, or subrogation rights waived, the underinsured motorist carrier

cannot practically undertake the defense of the tortfeasor due to the adverse interests and the apparent conflict of interest. From a practical standpoint, Plaintiffs invariably reach settlements with

tortfeasors ont he eve of trial, thereby placing the underinsured carrier in a position where it is unable to undertake the defense of the trial. It is this position that Plaintiff seeks the Court to adopt.

III. MOTION FOR PROTECTIVE ORDER.

Admirable in her consistency if nothing else, Plaintiff next moves for a protective order pursuant to R.C.P., Rule 26(c), citing no legal authority whatsoever, basing her Motion on no principle of law known in this jurisdiction and requiring the Court to look no further than the black letter of Code § 33-6-31 in order to refute the Plaintiff's position. Springing forward from the doubtful premises she had hoped to establish in her two prior arguments, the Plaintiff now asserts that the right of this Notice-Defendant to conduct discovery may be extinguished or limited by this Court notwithstanding the plain language of § 33-6-31. "[S]uch company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name." *Id.* The rights of the alleged tortfeasors to file Answers are, likewise, clearly defined in the statute. "*Nothing in this subsection shall prevent* such owner or operator from . . . taking any action in his own interest in connection with such proceeding." *Id.* (emphasis added).

Viewing these two provisions together, it is clear that § 33-6-31(d) grants this Notice-Defendant the unequivocal *right* to conduct discovery, separate and apart from the alleged tortfeasor defendant's right to do so. Neither this section nor

Rules of Civil Procedure nor the case law of this State limits this right or makes it contingent upon the presence or absence of other parties to the suit or the actions or inactions of such parties. Here, the Plaintiff turns her

eyes from the cosmos to her crystal ball in asserting as a rationale for impairing this Notice-Defendant's right to discovery that its discovery -- already served upon the Plaintiff -- "most assuredly will duplicate the discovery conducted on behalf of defendants' counsel [sic] in this proceeding . . ." notwithstanding the fact that the alleged tortfeasor defendants *have yet to serve any discovery whatsoever upon the Plaintiff.* Thus, the crux of Plaintiff's argument is that she should be relieved of the obligation to respond to proper discovery requests on the basis that they are duplicative of discovery requests which have never been propounded.

Even granting Plaintiff's clairvoyance and granting for the sake of argument that the alleged tortfeasor Defendants' discovery requests will be duplicative of those propounded by this Notice-Defendant, the Plaintiff offers no reason why it is the latter, which have already been propounded, which must yield to the former, which have not.

When considered together, the Plaintiff's purpose in filing these motions becomes apparent -- to impair the ability of this Notice-Defendant, the tortfeasor defendant or both to protect their interests as fully as they might under the Rules of Civil Procedure and other applicable law if sued separately and transform the present litigation from a search for the truth into a contest of procedural machinations. In so doing, the Plaintiff invites this Court to commit plain error. This is nowhere more evident than in the plain language of § 33-6-31, beyond which this Court need not look in order to refute the Plaintiff's plainly fallacious position. To the extent this Court feels a need to look beyond the language of the statute in order to resolve the question, this Notice-Defendant invites the

Court to consider the totality of legal authority cited by the Plaintiff in support of her three Motions -- none. The Plaintiff's conduct in filing these Motions is so beyond the pale of responsible advocacy as to be sanctionable pursuant to

R.C.P., Rule 11, and this Notice-Defendant has filed such a Motion herewith. In the interim, Plaintiff's Motions, and each of them, should be recognized for the self-serving prattle that they are and be denied.

ALLSTATE INSURANCE COMPANY
BY COUNSEL

MARTIN & SEIBERT, L.C.

BY: /s/ Walter M. Jones, III
Walter M. Jones, III
119 S. College Street
P. O. Box 1286
Martinsburg, WV 25401
(304) 267-8985

CERTIFICATE OF SERVICE

I, Walter M. Jones, III, Counsel for the Defendant, Allstate Insurance Company, hereby certify that I served a true copy of the foregoing **Memorandum of Points & Authorities in Support of Consolidated Opposition of Allstate Insurance Company to Plaintiff's Motion for Single Answer, Motion for Allstate Insurance Company to Make an Election Pursuant to W.Va. Code §33-6-11, Motion for Protective Order and Motion to Strike Various Affirmative Defenses and for Sanctions** upon the following individuals by placing the same in the U.S. Mail, First Class, postage prepaid, on this the *30th* day of April, 1993:

G. Charles Hughes
G. Charles Hughes, L.C.
P. O. Box 871
Moundsville, WV 26041

Robert P. Fitzsimmons
Fitzsimmons & Parsons, L.C.
2003 Warwood Avenue
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/s/ Walter M. Jones, III
Walter M. Jones, III

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